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# THE BOND OF FREEDOM

IN the year 1935 a London magistrate, who had in his time been a member of Parliament and a member of the Bar, announced from the Bench that he knew what law is and where to find the law; but that he was entirely unaware of the meaning of justice.

In the reconstruction of the world to which all men of goodwill are called in anticipation of the ending of the war, it is perhaps important that as many as possible (including members of Parliament and members of the Bar) should be aware of the principles of law and of justice. Long ago, Cicero and Augustine taught the world that justice is the binding principle of States. And Sir John Fortescue taught us that the Common Law of England consists of certain rules of justice, and even of natural justice.[1] Moreover, if, as some of our political leaders say, the reconstruction of England and of Europe is designed to restore and re-establish the traditional principles of English and European civilisation, a special duty will fall upon those who inherit the principles and traditions of the Common Law, which, one may remark, is the only great system of temporal law that came to us out of the Christian centuries; and which extends, one may add, to England (and Ireland) and Canada and Australia and New Zealand and in large measure (by statutory enactment) to India[2] and to

[1] "Man's laws are nothing else but certain rules whereby Justice is perfectly taught." The astonishing comment of Professor Winfield on the *de Natura Legis Naturae* of Fortescue that it deals with "a topic which has long ago had its brains knocked out" has been sufficiently answered in the lectures of Professor Lauterpacht. It is scarcely necessary to add that the rules of natural law and justice are used as leading principles in the jurisprudence of the canon lawyers who exercise jurisdiction in cases, e.g. of marriage and nullity, that presently concern some 300,000,000 folk in all parts of the world.

[2] In all the political unrest that has marked the recent history of India there has been (so far as I am aware) little or no complaint touching the administration of justice in that country. Indeed, recent decisions of the Indian Bench seem to show that in cases concerning the liberty of the subject the judges in India are no less attached to the traditional principles of the Common Law than were (shall we say?) the Law Lords in *Pat O'Brien* and in *Liversidge*.

most of the Colonies; and to all the States (save one) of the American Union.

Down to the Great War, indeed, it has been said that the world was ruled by two great systems of law and of legal tradition: the Roman and the English law.[3] The Roman law, it is said, speaking by and large, governed all the great countries of Europe and their non-European dependencies. In point of fact, the Roman law, which has a history of 25 centuries, is a system of law, pagan in origin, which made an essential difference between citizen and stranger, and between freeman and slave; and which in its classical period subjected all men to the absolute rule of the Emperor. "What the slave was in the hands of his master, the citizen was in the hands of the State." "The vice of the classic State," says Lord Acton, "was that it was Church and State in one. . . . In religion, morality and politics there was only one legislator and one authority." Constantine declared that his own will was equivalent to a rule of Canon Law. And Justinian declared that the Emperor's pleasure expressed by Edict or by letter had the force of law. Roman law runs easily to totalitarianism.

If the mark of the Civil Law tradition be thus, in the word of Professor Ernest Barker, *majestas*, the mark of the Common Law tradition is, in the language of the same authority, *libertas*. Quid sit libertas? asks Bracton on an early page. And answers: *Est autem libertas naturalis facultas ejus*, quod cuique facere libet, nisi quod jure aut vi prohibetur. *Sed secundum hoc videtur quod servi sint liberi. . . . In hac parte jus civile* vel gentium *detrahit juri naturali.*" And again: Quid sit servitus? Est quidem *servitus* constitutio juris gentium qua quis dominio alieno *contra naturam* subjicitur.[4]

Est autem libertas naturalis facultas ejus: By virtue of his nature man is free. The tradition runs true. After the lapse of five centuries Lord Mansfield will say: By the Common Law of England, no man may hold property in another.

The great creative effort of the Common Law lay thus in the affirmation and in the achievement of freedom; in the production of the *liber et legalis homo*, the free and lawful man; the normal or ordinary man; the reasonable man of the law. "Among laymen, the time had indeed already come when men of one sort, free and lawful men (*liberi et legales homines*), can be treated as men of the common, the ordinary, we may perhaps say the normal sort, while men of other sorts enjoy privileges or are subject to disabilities which can be called exceptional. The lay Englishman, free but not noble, who is of full age and who has forfeited none of his rights by crime or sin, is the law's typical man, typical person."[5] The energy and operation of English law and equity over a course of centuries was to effect

[3] Sir Thomas Willes Chitty in the Introduction to the *English and Empire Digest.*

[4] Italics are mine. It is interesting to observe that Bracton is decidedly more forthright in favour of freedom than his near contemporary St. Thomas Aquinas, who seems to have thought that slavery (being part of the *jus gentium*) was in line with the secondary principles of the natural law. See *Lottin, Droit Naturel*, pp. 89, 90, note.

[5] Pollock and Maitland, I, 407. "Our law hardly knows anything of a noble or a gentle class; all free men are in the main equal before the law": *ibid*, 408. For an appreciation of the "free and lawful man," see a letter from C. C. Martindale dated 26th September, 1938, in the *Daily Telegraph*.

the slow emancipation of slave and serf and villein and in the long run to elevate them all to the status of free citizenship.[6]

The idea of the *liber et legalis homo* which thus gave character and energy to the Common Law was a conception of Everyman as a reasonable and responsible being, with the freedom and power and dignity that are proper to our rational nature. Everyman is, indeed, in the eyes of the Common Law, presumed to be a free man, and a good man,[7] innocent of crime and wrongdoing, honest in his dealings, competent in his office, efficient in his work, firm and constant in danger and emergency, of good repute among his neighbours, fit to rule and manage his family and his own affairs, and to make and keep contracts (including a life-long contract of marriage), and fit also to own and to administer property.[8]

This English sense of the dignity and worth of human personality conceives Everyman to be not only a free citizen but also a free citizen living (in peace and friendship with his fellows) in a free community. The command to "render to Caesar the things that are Caesar's" at one and the same time gave to the civil power, under the protection of conscience, "a sacredness and in a sense a sanctity" it had never possessed, and imposed a limit which before it had not known. The words that occur in an early chapter of the Acts of the Apostles: "Whether it be right in the sight of God to hearken unto you rather than unto God," so Dr. Carlyle tells us, represent a mighty change in the relation of individual personality to society. The appearance of the Church as a power co-ordinate with the State and independent of it in its own sphere meant that the moral and spiritual life of man was no longer subject to the political organs of the community: the first clause of Magna Carta provides "Quod ecclesia anglicana libera sit et habeat omnia jura sua integra et libertates suas illaesas."

And even within the proper sphere of politics the Prince was no longer absolute. "The King is under God and the law," says Bracton in a famous passage,[9] "for the law makes the King. Let the King therefore attribute to the law what the law attributes to him, to wit, dominion and rule. For he is no King when Will and not Law is the principle of his rule."

Two centuries later an anonymous scribe will say, in one of the Year Books of Henry VI, "The law is the highest inheritance of the King by which he and all his subjects are ruled. And if there were no law, there would be no King and no inheritance."[10] The law which thus limited the

[6] Holdsworth, *History of English Law*, Vol. iii, 457. A. B. White, *Self-Government at the King's Command*, pp. 8, 25, 59, 77 and *passim*.

[7] "De omni homine presumitur quod sit bonus homo donec probetur in contrarium." The principle stated by Bracton will be denied by Hobbes and all the sect of totalitarians. A nature intrinsically evil must clearly be coerced by external power to decent courses and ways of living. For an interesting analysis of the influence of the Lutheran and Calvinist conception of man on the social and political ideas of modern Europe, see Eric Fromm, *The Fear of Freedom*, pp. 33–83.

[8] The power and right to own and administer property are founded, like freedom, on the rational nature of man: The principle is stated by Aquinas: "Sic habet homo naturale dominium exteriorum rerum quia *per rationem et voluntatem* potest uti rebus exterioribus ad suam utilitatem quasi proper se factis." It was re-affirmed in similar terms by Leo xiii in a well-known encyclical *Rerum Novarum* in 1891.

[9] De Legibus, ed. *Woodbine*, Vol. II, p. 33.

[10] Y.B., 19 Hen. vi, Pasch, pl. 1. "La ley est la plus haut inheritance que le Roy ad; car par la Ley, il même et toutes les subjects sont rulés, et s'il ce Ley ne fuit, nul Roy, ny nul inheritance serait."

King was not only the natural law[11] (which bound the Pope and King alike) but also the proper law of the English political community; the law and custom of the realm.

Here then at the heart and centre of the Common Law and of the Constitution (which is part of the Common Law) is a fine sense and ideal of the freedom and the dignity of human personality. From its beginnings in Bracton and Raleigh and Patteshull the Common Law of England had a noble conception of man and a noble conception of law, of man as a reasonable being[12] and of law as a reasonable rule.[13] By the vigorous use of these conceptions, and through the growth of a representative system (which also was unknown to the ancients) the unfree classes of slave and serf and villein were finally emancipated and in the course of time Everyman was established in dignity and status as a free and responsible person living in the fellowship of a free community.

To maintain the tradition of free men living in the fellowship of a free community is admitted on all hands to be the ideal at which to aim in the coming period of reconstruction and reform. The essential task in England and elsewhere must accordingly be to retain and (to the extent to which it may be necessary) to renew the conceptions of human dignity and freedom and responsibility that gave character and energy to English life and law.[14] The maintenance and (if need be) the renewal of this tradition loses none of its importance from the circumstance that the legal and political principles of the common law constitute (with a common language) the chief if not the only spiritual bond between the British Commonwealth and Empire and the States of the American Union.[15]

Now that even in England the constitutional tradition of the Common Law has been weakened and needs in some fashion to be renewed sufficiently

[11] The natural law in its widest sense may be said to be the sum, in order, of the dynamic principles that are immanent in created things. In a more proper sense, it is the reflection in the mind of man of the order of creation (participatio legis aeternae in rationali creatura).

[12] The conception (which was borrowed from Hebrew and Christian theology) of man as a being made in the image of God gave the law a deep respect for human personality and for the energy and freedom of the will. The respect which the law pays to the citizen will naturally vary according as it conceives man to be as a being made (*a*) in the image of God; or (*b*) in the image of society or of the proletariat; or (*c*) in the image of (German) blood and earth; or (*d*) as an element of Capital or Labour in a Trading State. See Nicolas Berdyaev, *Russian Revolution*, pp. 81–3. In a recent over-praised pamphlet, *Our Towns*, the hope is expressed (at p. 106) that John Smith's child shall become John Bull's child, "a cherished part of its country's capital." In a debate on Population in the House of Commons on July 15, 1943, Dr. Edith Summerskill stated that, as things are, the woman in the home "refused to produce the most valuable commodity, the embryo worker." In a letter to *The Times* of 26th July, 1943, Mr. Clement Davies, K.C., M.P., says that children "are part of the assets of the nation as a whole and the President (of the Board of Education) rightly says that 'in the youth of the nation we have our greatest national asset.'"

[13] In Holmes, *Common Law*, p. 210, the Common Law is stated to be "a far more developed, more rational, and mightier body of law than the Roman."

[14] "One of the chief characteristics of the British nation is a respect for the fabric of its inheritance. It holds, and with truth, that the foundations were well and truly laid by our ancestors": *Reform of the Public Health Services* by Sir Arthur MacNalty, Oxford University Press. "The men who were gathered at Westminster round Patteshull and Raleigh and Bracton were penning writs that would run in the name of Kingless Commonwealths on the other shore of the Atlantic Ocean. They were making right and wrong for us and for our children." Pollock and Maitland, II, *ad finem*.

[15] One can scarcely say, for example, that England and the United States share a common philosophy or a common theology at the present time.

appears from the disturbance, one might almost say the destruction, of the old constitutional balance between Church and State, and the decision of the House of Lords, in 1917, that (in popular language) Christianity is no longer part of the law of England.[16] This loss of constitutional balance led in turn to the extravagant claims of the Stuart Kings to rule Church and State by right of Prerogative; and to the not less extravagant claim of post-Revolution Parliaments to Omnipotence. Law is, according to Hobbes, the Command of a Sovereign Power which may be iniquitous but cannot be unjust. "Parliament," says Blackstone, "being the place where that absolute despotic power, which must in all government reside somewhere, is entrusted by the constitution of these kingdoms; it can regulate and new model the succession to the Crown; it can alter the established religion of the land; it can change and create afresh even the constitution of the Kingdom and of Parliaments themselves and therefore some have not scrupled to call its power by a figure rather too bold the Omnipotence of Parliament." In truth, the full notion of Sovereignty teaches that the Supreme Power of the State knows no limits and extends over the whole field of religion and of morals "as the King-in-Parliament is legally speaking omnicompetent and omnipotent to-day."

This claim of Parliament to Omnipotence is clearly excessive. Parliament is impotent to alter or affect the laws of biology or of psychology or of logic or (let us hazard, for the fun of it) of political economy. In the opinion also of Fortescue and St. Germain and of Coke and Holt a statute of Parliament is impotent to alter or affect the rules of ethics; that is to say, the law of nature or of reason.[17] One may venture to suggest that the argument which Mr. Wilfrid Greene, K.C., addressed to the Joint Select Committee of both Houses of Parliament on the Petition of Western Australia to secede from the Commonwealth, in 1935, that Parliament "could pass an Act to-morrow that all persons over the age of one year should be put to death" is repugnant to reason and good sense.[18] The advent of a period of reconstruction will provide an opportunity for a re-examination, in the light of history and philosophy, of the doctrine of the absolute power of Parliaments and of States; and for a restoration of the principles of natural law (or reason) and justice as the basis of national and international life.[19]

The re-affirmation of the rules of reason and of justice as the constitutive principles of law is designed also to restore or to retain the "reasonable man of the law" in his proper dignity and status. For there are indications of a certain impairment not only in the external balance of the

[16] *Bowman* v. *Secular Society*, 1917, A.C. 433. See the comment of Professor Holdsworth, H.E.L., Vol. viii, 420. One may observe that the White Paper on Education in effect treats the Church of England as disestablished. Indeed, during the debate on the Education Bill of 1870, Disraeli pointed out that it created a new priesthood (of Teachers) and a new religion (of Undenominationalism).

[17] "The law of nature of reasonable creatures is called by them that be learned in the law of England the law of reason": St. Germain, Dialogue, 3. Chrimes, *English Constitutional Ideas*, p. 290. For Coke the Common Law was "the perfection of reason"; and to that extent identical with the natural law. Hence, it is suggested, his *dictum* in Bonham's case, which has had a considerable history in the United States. In one of the Year Books Stonore, C.J., had put it in a single sentence: "Ley est resoun: that which is right."

[18] See *The Times*, 11th April, 1935.

[19] One may recall the words of Bracton: *Non est enim Rex ubi dominatur Voluntas et non Lex.*

constitution but also in the inner and central conception of the *liber et legalis homo,* the "free and lawful man."

The sense of human dignity and equality in the common law led to the rule that Everyman is responsible for his own act and that no man is liable in law for the act of another unless he had counselled or commanded (or ratified) it so as to make it *his* act also. "It would be against all reason," said Counsel *arguendo* (Y.B. 2, H. iv.), "to impute blame or default to a man where he has none in him, for the carelessness of his servants cannot be said to be his act (car negligence de ses servants ne peut être dit son fesauns)." In the course of the 18th and the early 19th centuries "in a conscious effort to adjust the rule of law to the expediency of mercantile affairs" the very new doctrine was introduced which made a master liable for the torts of his servant in the course of his employment. The liability of an employer for the acts and defaults of his servants, says Sir Frederick Pollock, "is analogous to duties imposed, with various degrees of stringency, on the owners of *things* which are or may be dangerous.[20]

In the series of Workmen's Compensation Acts, the workman is conceived as a mere unit of earning capacity,[21] and a being who is not fully responsible in law for his own acts or defaults. Thus, if an accident is due to negligence or default on the part of the workman, his claim for compensation is not affected unless the negligence or default amounts to serious and wilful misconduct. And gross negligence, it seems, does not necessarily amount to serious and wilful misconduct.[22]

An election to accept compensation under the Workmen's Compensation Acts debars an adult workman from bringing a common law action for negligence in respect of the same injury. The consideration of cases by infants seeking to proceed at common law (on the ground that acceptance of compensation under the Act was not for their benefit) has given the Courts an opportunity to express a judicial opinion on the relative value of proceedings for compensation under the statute and for damages at common law.[23] As a rule, the Courts seem to find no difficulty in deciding that the acceptance of compensation under the Statute is not for the benefit of the infant, and remit him to his remedy at common law, which conceives him not as a mere unit of earning capacity but as a whole human personality, as a "free and lawful man."

In this respect, it is interesting to observe that the Beveridge Report, which takes its conceptions and its point of departure from the Workmen's Compensation Act, 1897, and the series of subsequent statutes that embody the same ideas,[24] proposes "that insurance provision should exclude altogether actions for damages in cases in which they could be

[20] *Essays in Jurisprudence,* 128. Italics are mine. "The servant is but an instrument set in motion by the master," per Alderson, B. 5 Exch. 350. "The reason I am liable is this that by employing him I set the whole thing in motion," per Lord Brougham, 6, Cl. and F. 894, 910. Maitland agrees that the Common Law did not make masters pay for acts they had neither commanded nor ratified: to have done so would have been to punish a man for an offence in which he had no part. The modern rule, he thinks, is due to economic considerations, to the existence of large classes of men "from whom no right can be had," P. & M., II, 532–3. And see *Holdsworth,* viii, 479. If the law had not "adjusted itself to the expediency of mercantile affairs," it is not unlikely that the worker would have developed into a partner rather than a proletarian.

[21] *Stimpson* v. *Standard Telephones,* 1940, 1 K.B., 342, 356.

[22] *Halsbury,* Vol. 34 (1940), 870.

[23] See e.g. *Murray* v. *Swachman,* 1938, 1 K.B., 130; *Stimpson* v. *Standard Telephones, ubi sup.*

[24] Beveridge Report, para. 2, p. 5.

brought now."[25] In a revealing sentence the Report says: "It can be argued that if what is judged to be adequate compensation is provided from a Social Insurance Fund for industrial accidents, irrespective of any negligence causing them, there is no reason why this compensation should be greater because the employer has in fact been negligent. The needs of the injured person (workman?) are not greater." By a letter from their Secretary, which appeared in the *Law Journal* of 6th March, 1943, the lawyers of the Haldane Society, whose "whole object" (odd as it must seem to a common lawyer) is "to consider how to further the cause of socialism by means of law reform,"[26] publicly and properly rejected the proposal to deprive the injured workman of his alternative remedy at common law.

And here the Beveridge Report raises "yet another practical question: as to whether it should be left to the injured person to pursue his alternative remedy, or whether the Ministry of Social Security should be entitled to take proceedings, either with his consent or without it."[27] The notion that a State official should be entitled to bring proceedings in the name of a free citizen and without his consent is (one ventures to affirm) opposed to the whole spirit and tradition of the Common Law. The idea appears to have been introduced, as a kind of secondary and conditional remedy, in the Trade Boards Act, 1918, which provides (s. 9 (2)) that where it appears that any sum is due by an employer to a worker by reason of the fact that wages have been paid to that worker at less than the prescribed minimum rate *and that it is not possible to recover the sum due or any part of it by proceedings under s. 6 of the Statute*, the appropriate officer may, *if it appears expedient so to do by reason of the refusal or neglect of the worker to take the necessary proceedings*, on behalf of and in the name of the worker institute civil proceedings for the recovery of the sum due. The idea was boldly developed in the Agricultural Wages Act (Regulation) Act, 1924, which (by section 7 (7)) empowered the appropriate officer "to institute on behalf of or in the name of the worker civil proceedings for the recovery of any sum appearing to be due from an employer to a worker on account of the payment of wages to him at less than the minimum rate."[28] The Catering Wages Act of 1943 contains a similar provision in respect of wages due to the workers to whom the Act applies. The proposal in the Beveridge Report is to extend the new principle to the general body of workmen. That a State official should be entitled to bring an action in my name against my will is a manifest infringement of my personal liberty and in some sort a diminution or denial of my legal personality.[29]

[25] *Ibid.*, paras. 260, 262, p. 102. See also Appendix G to the Report at, e.g., pp. 143, 144, 153.

[26] See the pamphlet "The Law and Reconstruction," at p. 1. The reforms proposed are designed to establish "conditions which might be expected to be found in a socialist system of Justice" (p. 2) and impose on solicitors and counsel selected by the Public Legal Service Department a statutory duty to undertake work given to them (p. 5).

[27] Beveridge Report, para. 261, p. 102. It is hoped to publish, in one of our next issues, an article which will discuss the problem of the Social Security System as proposed by the Beveridge Plan in relation to Common Law remedies.—Ed.

[28] The powers of the officer were not to be in derogation of any right of the worker to recover such sum by civil proceedings.

[29] It is proper to point out that this section of the Beveridge Report has been reserved for further consideration by the Government and may not be translated into law. None the less it illustrates a tendency that seems to grow in favour among the officials who fashion our laws.

This displacement of the worker by an official leads naturally to the displacement of the Counsel or *advocatus* whom the free citizen was entitled to call to his side. "An officer acting for the purposes of this Act may institute proceedings for any offence under this Act and may, although not of counsel or a solicitor, conduct any such proceedings." Here is something far more radical in the way of reform than the assimilation "of the solicitor's profession and the Bar (or at any rate the Bar) to the character of Civil Servants" which Mr. C. P. Harvey desiderates.[30] It is the displacement of lawyers by officials and is in line with the use of officials in preference to the King's Judges for the purposes of so many of the modern statutes.[31] The freedom and the independence of the Bar is of a piece with the freedom and independence of the citizen. It is not surprising that in the article in which he proposes that the litigant should be deprived of the right to choose his own advocate and should be obliged to have an unknown Counsel allotted to him by the State,[32] Mr. C. P. Harvey also proposes to establish "an official service of salaried advocates who would be graded according to their seniority, their specialist lines of work, their local situations, and so on."[33] Such an "official service of salaried advocates" would be not less likely than a bench of independent judges to be "executive-minded." The traditional independence of the Bar is a necessary condition for the maintenance of the tradition of civil liberty.

There is much room for reform at the Bar and throughout the law. One feels, however, that Mr. C. P. Harvey and the members of the Sub-Committee of the Haldane Society who have published (price 4d.) their "recommendations as to law reform capable of being carried into effect during the war" approach the problem in the wrong way. The lawyers of the Haldane Society display a psychology that is at once naïve and attractive. They are naturally class-conscious as all good Socialists are apparently expected to be. They are convinced that courts of summary jurisdiction "are regarded with hatred and terror by the ordinary working man." They note, with surprise and regret, that "some Labour magistrates fall a prey to that unfortunate but not uncommon human failing which induces those who are invested with a little authority to show the world that they have got authority and are overcome with the grandeur of rubbing shoulders with members of the ruling class on the bench." For this reason perhaps, although it is admitted (at p. 7) that the magistrates courts "cover almost the whole scope of a working man's life, including his family life and his sexual life," it is proposed (at p. 12) that County Courts be given jurisdiction to try all undefended divorce cases. The proposal is unlikely to be accepted. Other proposals are made for immediate reform of the Workmen's Compensation Acts. "Much of it, if not all," we are told, "could be put into operation by Orders in Council without Parliamentary sanction." . . . And (with delightful naïveté

[30] MODERN LAW REVIEW, vi, 42.

[31] One may note also the abstraction of many matters, e.g. the production, distribution and sale of Milk, Potatoes, Pigs, Bacon, Herring, White Fish and the like from the purview of the Common Law by the series of Statutes and Orders which set up the several Marketing Boards.

[32] MODERN LAW REVIEW, vi, 42. Who, for the purposes of the proposed reform, is "the State"? Mr. Harvey seems to share the illusion (not to say the superstition), so common in our day, that the State is a Being of Infinite Wisdom and Infinite Power: See Sir Cecil Carr, *Concerning English Administrative Law, ad finem.*

[33] One remarks, no mention is made of ability.

here) "it could be effected without the insurance companies fully realising what was going on and adopting the blocking tactics at which they are so efficient."

Like Mr. C. P. Harvey, the members of the Sub-Committee of the Haldane Society are ready at the proper time to sacrifice the Law to the State. They are ready even now to sacrifice the law and their proper liberty as lawyers to the policy of a political party.

One must look elsewhere for those who, while not denying the need for reform in the law and in the arrangements of the legal profession in England,[34] still cherish and desire to defend and (to the extent to which it may be necessary) to restore the principles and traditions of the Common Law which constitute not the least part of the spiritual assets of the United Nations; to restore Justice as the binding principle of the political community; and Freedom as a thing due to Everyman as a member of the community; and an Equal Law as the sign and pledge of our human fellowship.

RICHARD O'SULLIVAN.

# INTERNATIONAL PUBLIC CORPORATIONS*

## I. General Observations on their Scope and Function

THERE is reason to expect a large expansion of international economic enterprise. Much of it forms part of the reconstruction work to which the governments of the United Nations are pledged. It is clear, therefore, that the ultimate responsibility for such enterprise will have to rest with the governments concerned, and not with private business. Many, though by no means all, of these tasks will be suitably undertaken by independent corporate bodies constituted in the form of commercial corporations. Many short-term tasks, and those which, for political or ethical reasons, must be kept out of any organisation in the form of potentially profit-making concerns, such as immediate food relief in Europe and the Far East, are likely to be undertaken by direct inter-governmental action. On the other hand, many essentially non-economic measures, such as repatriation schemes, international education or broadcasting schemes, etc., could be organised through public corporations, but are likely to be left to immediate governmental responsibility and co-operation.

There remain, however, a large number of essentially economic tasks which are: first, of international public importance, and therefore a matter of public responsibility; second, demand long-term investment of capital, permanent organisation and staffing; third, will have to undertake commercial functions, such as banking operations, the erection and servicing

[34] On the point of providing legal assistance to the poor, one may recall an old rule: Brian, C.J., said that if a Serjeant declines to plead for a poor man when the Court orders him: "nous ne lui poyomes faire non-serjeant car il a ce nosme donne par le Roy, mais nous poyomes lui estrange del barr issint qu'il ne serra resceu de pleader." Cited Holdsworth, H.E.L., ii, 491. The lords, it seems, had a similar rule, *ibid*, SS. ii, 8, 16.

* This article is based upon a paper read to the Grotius Society, in June, 1943.

of plant, the acquisition of land, the hiring and employment of labour, the supply of goods and services.

This type of enterprise demands institutions which have definite corporate status and which, to use the language of President Roosevelt, in his message to Congress (1933) recommending the formation of the Tennessee Valley Authority, are "clothed with the power of government, but possessed of the flexibility and initiative of a private enterprise." Transferring this definition to the international sphere, we might define the International Public Corporation (I.P.C.) as international corporate bodies established for purposes of international government but constituted as commercial corporations.

Among the more concrete international projects for which this form is envisaged are the International Investment Corporation, suggested by Mr. Herbert Morrison, the World Investment Bank, suggested by the United States, the International Clearing Union and the Stabilisation Fund outlined by the British Chancellor of the Exchequer and the American Treasury, and the United Nations Relief and Rehabilitation Administration (U.N.R.R.A.). Among further likely international enterprises, a Danube Power Authority, a Balkan Transport Board, a Board for the Restoration and Development of Livestock, an International Raw Material Pool, spring to mind as being of particular importance and urgency.

Since the last war the public corporation has been developed in many different countries, living under very different social and economic systems, as the best way of administering public utilities, for the public benefit, but in the form of an independent commercial corporation. The greatest enterprise of this kind is probably the Tennessee Valley Authority, one of the outstanding achievements of the New Deal Administration, the greatest of a number of similar enterprises in the United States. Great Britain has, among others, The London Passenger Transport Board, The Overseas Air Board, The B.B.C., and the proposed Scottish Hydro-Electric Power Board. In Germany, the State Railways and the Postal Service have, for many years, been run as public corporations. The Soviet Union has constituted a number of State Trusts, organised as independent units with separate personality, management, budget and responsibility. It is noteworthy that the public corporation is thus known to many different economic systems, from socialism to controlled capitalism.

The constitution and status of these public corporations varies considerably from country to country, and within one country, but certain common features have emerged, the most important of which may be summarised as follows—

1. Autonomy of legal and financial status.

2. Non-political management, though there is no unanimity as to the status of the personnel, which may or may not be in the position of a Civil Service.

3. Long-term financing, by government appropriations, by shares subscribed by the government or other public authorities, or by debentures issued to the public, such long-term financing enabling the corporation to stand on its own feet.

4. Absence of control by private shareholders, instead of which, control is exercised partly by government departments (Treasury supervision), partly by Parliament (periodical appropriations). There is much controversy about the appropriate degree of parliamentary and executive control over public corporations. While too much interference cramps

initiative, too little control may lead to slackness, abuse, and the formation of autonomous vested interests.[1]

In the international sphere the same problems exist. But the lack of integration and legal organisation of international as compared with national society, adds to these problems a number of others, and two in particular. The first problem results from the cramping effect of national sovereignty, which has so far impeded the legal, financial, managerial and psychological independence of all international institutions. The second problem results from the inequality of different states in political and economic power, and the consequent need to counter-balance the preponderance of any one state.

## II. International Precedents

So far, International Law affords little guidance for the constitution of future I.P.C.s, mainly because international institutions are in a tentative stage and because the impact of the assumption of public responsibility for economic affairs has, as yet, hardly reflected itself in International Law. The following brief survey will select four different international organisations, each representing a certain type, and each revealing certain specific deficiencies.

### 1. *European Danube Commission*

The European Danube Commission has been defined as "an experiment in direct international government, enforcing its decisions by its own authority, through its own agents and under its own flag. It can impose taxes, regulate navigation, carry out river work, pilot services. Merchant captains must obey its orders. Judicial powers are conferred on the Inspector-General and the Captain of the Port of Simla."[2]

There is no doubt of the independent legal personality of the European Danube Commission. It is, however, not an international public corporation, but an administrative organ of international government, constituted as an independent commission.[3]

### 2. *International Unions*

There are numerous international unions, entrusted with many different tasks of an international character, scientific, technical, humanitarian. Best known among them are perhaps the International Postal Union, the so-called Berne Unions for the protection of copyright and industrial property, and the International Institute of Agriculture.

International unions are, legally, of many different types, but the following features have emerged—

(*a*) They rest on an International Convention which constitutes a conference or congress that meets periodically, and a permanent executive office.

(*b*) Some unions, like the Berne Unions, are closely linked with the state of their domicile, in matters of personnel, disciplinary supervision,

[1] Cf. Gordon, *The Public Corporation in Great Britain*, p. 327; Lilienthal and Marquis, 54 Harv. L.R. 545 *et seq.*

[2] H. A. Smith, *Economic Uses of Rivers*, p. 123; cf. also *Opinion of Permanent Court of International Justice*, Ser. B, No. 14.

[3] For its legal personality, cf. Triepel, *Internationale Wasserläufe*, p. 21; Solms-Braunfels, *Die völkerrechtliche Stellung der Donau*, p. 63.

and legal status. Others, like the International Institute of Agriculture, are more truly international in composition and status.

(*c*) The most interesting legal problem is how far international unions have been made independent from the states which have constituted them. The most important aspect of this question is: firstly, their legal status; secondly, their financial independence.

On the legal status of international unions there is much controversy. Some writers attribute corporate personality to the permanent office or bureau, though not to the general conference.[4] But the legal status of the union has very seldom been clarified by any specific provision. That became evident when the Postal Union became involved in legal difficulties when it attempted to purchase a building. The Belgian Law of 25th October, 1919, accords personality to international associations with scientific aims and a permanent bureau in Belgium. This constitutes a kind of naturalisation of an international association. Among these non-commercial international institutions, the International Institute of Agriculture probably comes nearest to a truly international status and personality.[5]

The most important practical aspect of independent status is finance. Although some unions of a mainly technical character, like the International Postal Union, have come to be so universally felt to be indispensable that they work in a condition of practical, if not theoretical, independence, international unions have always been ultimately dependent on the power of the purse of the member states. The kind of international institution that has developed so far has to be financed by regular contributions from the states. Sometimes they are able to supplement their income by fees (e.g. Registration of International Trade Marks), but this has not mitigated to any considerable degree their essential financial dependence. Three weaknesses in particular characterise the financial position of international unions—

1. In the absence of a clear corporate status, the property in the funds remains with the contributing states. The consequence is that the states have a claim for refund if a contribution is not used for the particular budgetary purpose for which it has been subscribed.[6]

2. On the other hand, International Law does not yet know any legal process for recovery of contributions from a debtor state, or any other legal sanction.

3. The unanimity rule, which applies to all decisions taken by international unions,[7] has cramped their power of action as it has that of the League of Nations.[8]

International unions, therefore, reveal two fundamental weaknesses: first, the absence of a clear international corporate status; and second,

[4] For a survey and discussion of the different views, see Ruffini, *Hague Recueil*, 1926 (II), 478, *et seq.*

[5] For a discussion of this point, see below, p. 203.

[6] Cf. a specific provision to this effect, regarding the Working Capital Fund, in the League Financial Regulations, Art. 31.

[7] With very few relatively unimportant exceptions, such as certain decisions taken by the Institute of Agriculture, or the former Sugar Commission. To these might be added the Constitutional Convention, by which decisions of the Budget Committee of the League of Nations came to be accepted by the member states. (Jenks—*loc. cit.*, p. 102.)

[8] The financial aspect of the status of international institutions has been trenchantly characterised by C. W. Jenks, *Transactions of Grotius Society*, Vol. 28, pp. 87–132.

the weakness of the dependence of international institutions on the revocable will of sovereign states.

The proposals for an International Clearing Union[9] imply a curtailment of this sovereignty, as is clearly apparent from the concluding section (Section 45). Although the proposals do not specifically deal with legal and constitutional aspects, they clearly envisage an independent and corporate status of the Union. Otherwise the holding and disposing of clearing accounts, its dealings with many different states and institutions, would meet with insuperable difficulties. The Union is to have permanent executive offices and a Governing Board armed with considerable powers in relation to the member states. They include the right to demand a reduction of credit or debit balances, the surrender of gold or other reserves, a reduction of the quotas of members, in certain circumstances. The Board has the right to demand the withdrawal of a member in case of a breach of agreement, while a member state is entitled to give notice only subject to its making satisfactory arrangements to discharge any debit balance. This constitutes a noteworthy advance towards the recognition of definite legal rights and duties as between an international institution and the constituent states, and it would only be a logical implementation of this assignment of mutual rights and duties to fortify it by a clear process of legal recovery in International Law.

3. *International Labour Organisation*

As compared with the previous institutions, the I.L.O. has certain distinctive features. Firstly, it enjoys a relatively greater autonomy. The Governing Body and the Conference between them determine policy, and though the I.L.O. is ultimately dependent on the League it has always worked in relatively greater independence from the League. This autonomy has been strengthened by the transfer, during the present emergency, of the administrative and financial powers of the Assembly to the Director of the I.L.O., with the approval of a supervisory Commission deciding by majority vote. Secondly, the I.L.O. has developed a body of permanent international officials, and a distinct international executive, in the International Labour Office, at present in Canada. The I.L.O. is thirdly distinguished by its tripartite character, that is, the direct representation of organised groups of employers and labour, side by side with state delegates. How far this tripartite character would be applicable to other international institutions is a matter to be discussed later on.

The I.L.O. shares, however, with other international institutions two decisive weaknesses: firstly, it is dependent on annual state appropriations, and thus enjoys no independence of financial status, which has inevitably a crippling effect upon long-term planning. Secondly, its decisions are not binding on any government, but even when adopted by all the organs of the I.L.O., including the state delegates, are subject to separate national ratifications. It is well known how many valuable social measures have failed through this constitutional obstacle.[10]

[9] Presented by the Chancellor of the Exchequer to Parliament, April, 1943, Cmd. 6437.

[10] The example best known to English lawyers is the series of Conventions adopted in 1935 by the Canadian Government, but declared invalid by the Privy Council as an infringement of the constitutional preserve of the Provinces (*A.-G. for Canada* v. *A.-G. for Ontario* (1937), A.C. 326).

4. *The Bank for International Settlements*

The B.I.S. constitutes the most direct precedent for International Public Corporations. It enjoys undoubtedly distinct corporate status and legal personality. Sir John Fischer Williams has defined it as an example of "bodies which are neither states, nor individuals, nor a combination of states or individuals, but right-and-duty-bearing international creations, to which for want of a better name the title, 'International Body Corporate,' 'Personne Juridique Internationale,' may, perhaps, be accorded."[11]

The constitutional pattern adopted for the establishment of the B.I.S. is undoubtedly of interest for future I.P.C.'s. It has three distinctive parts—

(*a*) A Constituent Convention (in two parts: one between Germany and the government of the creditor states; the other between Switzerland and the governments participating in the Convention).

(*b*) By-laws which define the powers, rights, and privileges of the Bank.

(*c*) An incorporating Charter granted by Switzerland as the country of incorporation.

The most distinctive feature of the B.I.S. is its unqualified autonomy. It was founded in a period of disappointment with the results of the Reparations Settlement of the Treaty of Versailles and of distrust of governments as suitable institutions to deal with such matters. The constitution of the B.I.S. proclaims the belief in the superior capacity of business in dealing with economic and financial matters. The shares were not, therefore, taken up by the constituent governments, but by the central banks of the participating states and a group of American banks.

The constitution of the B.I.S. provides for no control organ whatsoever. Management, direction, and supervision are entirely left with the Governing Board, constituted by a number of Bank presidents. Although the B.I.S was given considerable powers to promote international finance and trade, this part of its functions never developed at all. This, however, must be attributed less to the deficiencies of the B.I.S. itself than to the general international situation. The complete constitutional autonomy and absence of public international control has, on the other hand, led to disastrous results, which should be taken as a warning for future I.P.C.s. When, in June, 1939, the Bank handed over the Czech gold deposits to the German Government, as protector of the Republic which it had occupied in defiance of International Law, the governments of the different countries concerned might perhaps have been able to prevent such action, had their own policy been firm enough. But they had no constitutional or legal means of influencing the decision of the Board. This was true, for example, of the British Government, although the gold which was handed over was deposited with the Bank of England. Although the B.I.S. was thus free from any constitutional responsibility to either national or international public organs, its autonomy worked differently according to the position of the Presidents of the Central Banks in their respective countries. While the German directors acted under Government direction, the British directors, despite the semi-official status of the Bank of England, were not responsible to anyone. The American bankers on the Board were neither official nor responsible to any authority. The kind of autonomy developed for the B.I.S. must thus serve as a warning example rather than as a model. Responsible neither to national nor to international authority,

[11] *Amer. Journ. of Int. Law*, 1930, p. 665.

it has encouraged an independence of financial interests, removed from national as much as from international government.

### III. Outline of Structure and Status of the I.P.C.

A technical discussion of the constitution, structure, and status of the I.P.C. as a basis for such different enterprises as an International Clearing Union, an International Air Transport Board, a Danube Valley Authority, or an International Livestock Board, must rest on certain clear and unambiguous assumptions of principle.

Three major assumptions underlie the following discussion—

1. That the I.P.C. must be a genuinely international institution, as the joint enterprise of a number of states.

2. That the value of the public corporation lies in its managerial and financial autonomy, provided this autonomy is blended with accountability and responsibility to the appropriate national and international public organs.

3. That the I.P.C. must not become the instrument of indirect economic domination of economically weaker by economically stronger states.

The rejection of any or all of these assumptions would modify some of the technical argument that follows.

While the actual constitution of different I.P.C.s will undoubtedly raise many special problems, the following seem to stand out as of cardinal importance—

1. The constitutional foundations.
2. The capital structure and method of financing.
3. The selection and status of management and staff.
4. The principles and structure of control over the I.P.C
5. The international corporate status of the I.P.C.

#### 1. *Constitutional Form.*

The pattern of the constitution of the I.P.C. emerges clearly from its position in interstate relations and is supported by many international precedents. There will be a constituent convention between the participating states, which must be concluded for a period sufficient to allow for full development and testing. This convention lays down general principles and the obligations which the parties undertake to ensure the effectiveness of the institution which they agree to create. Foremost among them must be an undertaking to grant the I.P.C. all the necessary powers, privileges, and rights agreed to in the convention and specified in the by-laws, and to enact any legislation and to take any "other action necessary to effectuate and protect such powers, rights, and privileges."[12] These powers, rights, and privileges will be specified and defined in the by-laws. In previous cases it has been deemed necessary to base the actual corporate existence of an I.P.C. on a third document, a national charter granted by one particular state.[13] The sole exception appears to be the corporate "Funds" created by the 1930 agreement between Hungary and her creditors.[14]

[12] Inter-American Bank Convention, Art. I. (I.A.B. Draft.)

[13] A Swiss Charter in the case of the B.I.S., a U.S.A. Charter in the case of the I.A.B. Draft.

[14] Cf. Fischer Williams, *Amer. Journ. of Int. Law*, 1930, p. 673.

It will be shown below that there is no need, in law, logic, or convenience, for such a national charter, which detracts from the international status of the I.P.C.

It is a matter for serious consideration whether there should be any provisions for—

(*a*) Amendment of the constituent convention.

(*b*) Withdrawal of members.

The position of the I.P.C. differs from that of other international institutions. It needs a long-term policy of investment and management which would be greatly impaired by the danger of amendments affecting its status. The member states ought to be bound by the principles laid down in the convention for the period fixed, which will vary according to circumstances, but should hardly be less than five years.[15] As will be explained below, the member states will be able to control policy through an inter-governmental control commission.

Where the time limit of the convention is not very long, say five years, it would be desirable, in the interest of stable development, to exclude a right of withdrawal during such period. The withdrawal of a member state would affect: (*a*) the composition of the inter-governmental control organ; (*b*) the capital holdings according to the type of capital structure chosen.[16]

Where the capital is provided by government-subscribed shares, provisions would be necessary for transfer of shares, which would probably have to be made dependent on the consent of the Governing Board[17] or be limited to other member states or restricted in some other way. Where the I.P.C. finances itself by public international debentures, or its own earnings, the effect on its capital structure would be small or nil. Where, on the other hand, it depends entirely on government subscription, withdrawal of a member would not only affect the control organ, but the financial structure of the I.P.C.

On balance, the best solution in the interest of a vigorous and undisturbed development of the I.P.C. would be to limit the duration of the constituent convention to a comparatively short period (say five years) and to exclude, during that period, both amendment and withdrawal. When the convention comes up for reconsideration, members may decline to renew their signature and the terms be revised in the light of experience and new needs.[18]

2. *Capital Structure and Financing Methods.*

The method of providing the capital of the I.P.C. raises problems of fundamental importance.

[15] Five years is suggested in the Proposals for an International Clearing Union (II, 12 (18) ). The B.I.S. was constituted for 15 years; the Draft Constitution of an Inter-American Bank prepared by a Committee of the Inter-American Union (I.A.B. Draft) suggests 20 years. No time limit is provided in the Constitution of the United Nations Relief and Rehabilitation Administration (U.N.R.R.A.).

[16] See below.

[17] As in the case of the B.I.S.

[18] The proposals for a Clearing Union give a right to withdraw on a year's notice, subject to discharge of debit balances, and provide for reconsideration of the principles of the Union after five years' experience, if a majority of an annual assembly of the member states desires it (II, 6 (16), (18) ). The U.N.R.R.A. provides for withdrawal, with 12 months' notice, and for amendment by two-thirds' vote of the Council (composed of all signatories), and, where new obligations are imposed, acceptance by each affected member.

It is a decisive advantage of international institutions constituted as corporations over the diverse other types with less autonomy, such as unions, commissions, and other inter-governmental agencies, that they have legal ownership of funds, and are thus able to lead an independent financial existence.

Three alternative methods of financing the I.P.C. commend themselves—

1. The raising of capital by shares, i.e. the joint-stock pattern.
2. The issue of debentures which bear interest.
3. Direct governmental contributions in agreed quotas.

One of the first two methods will have to be chosen for any I.P.C. which requires large capital investments. Thus, a Danube Valley Authority or an International Air Transport Service obviously require substantial capital for the provision of plant, construction work, and the operation of services. The third method commends itself for that type of I.P.C. which mainly demands international organisation and scientific or technical advisory work, but no large expenditure. This would apply, for example, to the proposed International Clearing Union, which will need much organisation, but little capital investment, or to a Livestock Board, whose function would be the scientific building up and exchange of pedigree stock, the provision of expert advice, and other services. The situation might be similar in the case of a raw-materials pool or a foodstuffs pool, though the latter might require more capital for large-scale supplies and exchanges. The applicability of the third method must, however, depend on a hitherto unfulfilled condition: the undertaking, by the states concerned, of definite legal obligations, recoverable by process of law. Mr. Jenks has analysed the fatal weakness of the position of international institutions, in the absence of such clear obligations, and outlined the possibilities of a procedure, such as an application, by the treasurer of the international institution, before a Chamber for Summary Procedure or another international organ, leading to an order, or summons, which entitles the creditor to attach assets of the defaulting state in any member state.[19] Such a machinery entails a number of parallel and supplementary provisions, such as agreement about the method and rate of currency transfer. Undertakings to exempt such transfers, wholly or partly, from existing national currency restrictions might be suitably included in the constituent convention.[20] Any obstacles to such a development are certainly not technical, but political, grounded in the tenets of absolute national sovereignty and "the timidity of men's minds."[21]

Where the I.P.C. is entirely or predominantly financed by direct state appropriations, the question of political control of such appropriations from within the participating states becomes important.

Students of the National Public Corporations have devoted much attention to the respective merits of Treasury and Parliamentary control on the one hand, and financial autonomy on the other hand. Conclusions are, on the whole, in favour of freeing the public corporation from cramping Treasury supervision or parliamentary bickering, while subjecting it, on the other hand, to public supervision, by public auditors, annual reports, selected parliamentary or other representative and responsible committees.

In the international sphere, the cramping effect of frequent interference

[19] Jenks in *Grotius Soc. Transactions*, Vol. 28, 113, *sqq.*
[20] For an example, see I.A.B. Draft, Art. II. B.
[21] Jenks, *loc. cit.*

would be multiplied manifold by the number of countries concerned, and the need is, therefore, clearly for long-term national appropriations for a period of years, and transfer of control, during that period, to an inter-governmental agency, such as a Permanent Control Commission. Here the problem becomes one aspect of the more general problem of supervisory control over the I.P.C.[22]

Most I.P.C.s will, however, require a more elaborate and independent capital structure detached from either annual, long-term, or standing appropriations. Existing international corporations, such as the B.I.S., the abortive Bank for International Agrarian Credits, or the Draft Scheme for the Inter-American Bank,[23] have all been constituted as companies limited by shares. But the essentials of a private company limited by shares are lacking. For, in every case, the shareholders are determined by the convention and by-laws, and voting power is either fixed in this manner, or detached from the ownership of shares in some other way. Thus, the total shares of the B.I.S. were guaranteed and 56 per cent taken up by central banks of the six principal participating states and a group of American banks. The remainder was offered to the central banks of certain other countries. Of any increase in the share capital, 55 per cent must be offered for subscription to the central banks participating in the original guarantee. The bank may, without giving any reason, decline to accept any nominee as transferee. In the case of the abortive Agrarian Bank, the transfer of voting shares (A shares) was to be dependent on the consent of Governing Board.[24] In the case of the Inter-American Bank, stock is to be available for subscription only to the Governments of the American Republics which have adhered to the Convention. The condition of participation is subscription for a minimum number of shares, determined in relation to the value of the total foreign trade of each Republic in 1938. The American states are, accordingly, divided into eight groups, rising from a minimum of 5 shares to a minimum of 50 shares. But each government obtains 20 votes for its minimum shares. It can subscribe to further shares, with one vote for each additional share, but no government must have voting power in excess of 50 per cent of the total voting power of all the other participating governments.

It is thus clear that the public function and character of these institutions has deprived the share of its normal function of free assignability, as well as of its link with voting power as the means of control.

The dividend-bearing capacity of the shares, too, has been greatly modified and restricted. The B.I.S. has to pay 5 per cent of its yearly profit into a reserve fund, until 10 per cent of the paid share capital is reached. Then dividends may be paid within certain limits. The I.A.B. must pay no less than 25 per cent of its yearly profits into surplus until the surplus is equal to the par value of the authorised capital stock before dividends can be paid.

As the predominant field for I.C.P.s is likely to be international economic reconstruction and development, largely in countries devastated and impoverished by the war, dividends must be subject to even more rigid limitations. It cannot be too strongly emphasised that the main

[22] See below, p. 199.

[23] For full text and comment, see Heymann, *Plan for Permanent Peace* (1942), ch. VI.

[24] For details, see Schwarzenberger, *Die Internationalen Banken für Zahlungsausgleich und Agrarkredite*, 1932.

value and function of the public corporation does not consist in its making quick profits, but in its constitution as an independent body, whose management, accounts, financial conduct, and general efficiency can be checked. This reason has led to the use of independent state trusts in the socialist economy of Soviet Russia, while, in other countries, public corporations often are either non-profit making or pay fixed dividends.[25] In international relations, the long-term constructive tasks are bound to outweigh even more the financial profit motive. The profit of power or transport development in the Balkans or of European Air Services lies in its advantage to the international public, to economic advancement, a general improvement in the standard of living, and peaceful development.

Much is, therefore, to be said for abandoning share capital in favour of fixed interest-bearing debentures. Whatever the advantages and disadvantages of either method may be for national public corporations,[26] for international corporations the advantages of attracting interest by the prospect of profits are not likely to be of any significance for a long time to come. Where the capital will have to be provided by the participating governments, national exchequers might find it preferable to subscribe in the form of debentures, with a fixed rate of interest, supplemented, where necessary, by a subsidiary guarantee, rather than to budget for an uncertain profit contingency and to be subjected to parliamentary pressure for a showing of profits. The issue of debentures, divorced from control and voting power, would make it possible to throw open subscription to the international public, and thus to stimulate general interest. In the case of a promising I.P.C., it would provide the easiest way of raising additional capital.[27] It would also make the I.P.C. more shock-proof against the financial effects of a withdrawal of member states, should such a right of withdrawal be conceded.[28]

Some I.P.C. such as a Danube Valley Authority may, however, well be able, after a period of development, to earn part of their expenditure and eventually to be "self-liquidating," by selling their products and services on an economic basis, even if dividend-bearing shares are issued. By-laws will have to provide for reserve and development funds, into which profits have to be paid until the stage of development reached and the reserve accumulated will justify the payment of dividends.

Whatever the method chosen—and different methods might prove preferable for different types of I.P.C.—it is essential that all of them—government subscriptions out of permanent or periodical appropriations, debentures, or shares taken up in agreed proportions—should be considered as long-term investments in international economic development, whose main dividend is the promotion of desirable international objects. Payment of dividends must be a secondary consideration.

3. *Management and Staff.*

The question of the personnel that directs and administers international institutions is of crucial importance for the development of any society

[25] See, for U.S.A., Lilienthal and Marquis, 54 Harv. L.R. 545; for Great Britain, Gordon, *The Public Corporation*, and Robson (ed.), *Public Enterprise*.

[26] On these, see Lilienthal and Marquis, *loc. cit.*, pp. 590–91.

[27] The formation of an International Airways Corporation, with fixed-interest-bearing stock to be subscribed for by governments, banks, or individuals, has been suggested by Mr. Bowles, M.P., in the House of Commons (as reported in *The Times*, 2nd June, 1943).

[28] Cf. above, p. 192.

and government that transcends exclusively national loyalties. Here, the League of Nations, with its many ramifications, and the International Labour Organisation, provide valuable guidance. The Balfour Report of 1920, supplemented by the Noblemaire Report of 1921, and the Report of the Committee of Thirteen in 1930, laid down the foundations of an International Public Service which have been implemented by the building up of a genuine body of international civil servants in the League Secretariat and the International Labour Office. But this development of a body of international public servants has been confined to the technical and executive side. It was quite proper that the supervising organs, such as the League Assembly and Council, or various League Committees, and the International Labour Conference should have been constituted on an inter-governmental basis. The trouble was that, owing to general international developments, these various bodies did not develop a genuine super-national policy, but disintegrated more and more into a discussion forum where divergent national policies fought each other. There are some notable exceptions, of which the most important is, perhaps, the I.L.O. Its relatively greater independence from national policies, its greater esprit de corps, may be due, to some extent, to its tripartite character.[29] But this relative independence—strengthened, at present, by the transfer of the powers of the League to a supervisory commission—was permitted only because all the resolutions of the I.L.O. were, and are, subject to ratification by each individual state, and thus leave the ultimate decision to national policy.

The I.P.C., constituted on an altogether more autonomous basis, must clearly advance beyond this stage if the idea of international public enterprise is to be made real. The principle should be that the executive, that is, the entire personnel of the I.P.C. from the Governing Board downwards, must be selected and hold its posts on a genuinely international basis, while the organs of supervision will be constituted on an inter-governmental basis and thus represent the different national state interests on joint organs of control.

The few existing or planned comparable institutions have, indeed, not been constituted on this basis. The B.I.S. can hardly serve as a model, for its absolute business autonomy in the form of a condominium of central bank presidents and other banking interests, coupled with the absence of either open governmental or any public international control, is not worthy of imitation. But the I.A.B. Draft of 1940, a much more interesting and valuable scheme, constitutes the board of directors from one director and one alternate appointed by each participating government, and these directors exercise the voting power of their government. Apart from that, the participating governments may make "timely objections" to certain transactions of the bank.

A similar procedure is suggested in the Chancellor's proposals for an International Clearing Union.[30]

"The Governing Board shall be appointed by the Governments of the member states, those with the larger quotas being entitled to appoint a member individually, and those with smaller quotas appointing in convenient political or geographical groups, so that the members would not exceed

[29] On which see Jenks in *Grotius Soc.*, Vol. 22, pp. 45 *sqq*: also *Journ. for Comp. Legislation* (1940) pp. 36–56; Janouloff, *Hague Recueil*, 1935 (1), p. 483, 521.

[30] Cmd. 643d.

(say) 12 or 15 in number. Each representative on the Governing Board shall have a vote in proportion to the quotas of the State (or States) appointing him, except that on a proposal to increase a particular quota, a representative's voting power shall be measured by the quotas of the member states appointing him, increased by their credit balance or decreased by their debit balance, averaged in each case over the past two years. Each member state which is not individually represented on the Governing Board shall be entitled to appoint a permanent delegate to the Union to maintain contact with the Board and to act as *liaison* for daily business and for the exchange of information with the Executive of the Union. Such delegate shall be entitled to be present at the Governing Board when any matter is under consideration which specially concerns the State he represents, and to take part in the discussion."

This method, which may be described as a slightly improved version of the rules governing representation on the League Council, well illustrates the difficulties of any satisfactory management based on national quotas. But while it may be acceptable for an essentially regulatory institution, a Governing Board composed by national quotas would be even less satisfactory for the most likely type of I.P.C.: that concerned with specific economic and technical tasks of reconstruction and development. While some of these I.P.C.s may be of a predominantly technical character, most of them will involve questions of general policy. The two spheres should, as far as possible, be kept distinct, and it seems vital to the development of the I.P.C. as an international public enterprise that its immediate management should be detached from national policies, quotas, and loyalties. Controlling policy, on the other hand, should rest with a joint body formed by the representatives of the participating states.[31]

The general conference or a special joint committee appointed by such conference should be entrusted with appointments, and these appointments should be guided by qualification, not nationality. A Danube Valley Authority will need engineers, Balkan experts, economists as well as administrators with wide international knowledge and experience. A European Livestock Board will need agricultural scientists and economists, among others. There are such men and women in many countries, but not necessarily in the quotas proportionate to the national subscription or the political power of a particular state. The vicious circle of national quotas countering international development can only be broken if appointment and tenure of office are detached from nationality and eminent specialists are not debarred from serving a vital international cause because the national quota is exhausted.

It follows that the conditions of employment and the work of the staff must be subject to international control. In the absence of a wider international agency, the appointing committee might be charged with the administrative supervision; but it is urgently to be desired that eventually a more universal international commission should be constituted to supervise the work and current functions of the I.P.C. It would be easier for such a commission to compare the work of different institutions

[31] In the I.L.O. direction is shared between the Governing Body and the General Conference (which meets at least once a year); but the composition of both is determined by the tripartite principle. The proposals for a Clearing Union contain a few lines on an annual Assembly composed of representatives of every member state. It shall receive annual reports from the Governing Board, move proposals, and, every five years, reconsider the principles and rules of the Union if a majority of the Assembly desires it (II, 6 (18)). For U.N.R.R.A., see below, p. 201.

of the same type, to develop a consistent experience and practice, to evolve appropriate conditions of service and employment, and thus to assist in the development of general administrative principles as regards duties, rights, and functions. One of the indispensable functions of supervision is regular auditing and such an international agency should have attached to itself a staff of international auditors, who, in this way, would soon develop methods and principles of auditing appropriate to this kind of enterprise. Like the Permanent Mandates Commission, it would receive periodical reports from the I.P.C., comment on them, and forward them to the different standing or control committees formed by the constituent conferences of different I.P.C.s. These, in their turn, would serve as the link and channel of communications between the Governments, Parliaments, or other agencies of the different countries.

An International Administrative Tribunal is the necessary counterpart of the immunity from national jurisdiction, which must be granted to servants of a public international institution. There are, indeed, several precedents of international administrative tribunals, such as those constituted for the League of Nations and the I.L.O. in 1927, and for the International Institute of Agriculture in 1936.[32] For reasons parallel to those just given in favour of a unified agency of administrative control, Mr. Jenks has recently suggested a World Administrative Tribunal, which would have jurisdiction over all complaints regarding conditions of employment in international institutions.[33] He further suggests that this tribunal should be competent "in cases in which some official act performed on behalf of an international institution is alleged to violate a private right; in cases in which international institutions are involved in legal relationships governed by municipal law, such as disputes relating to real estate, building contracts, printing contracts, and such matters." While the last-mentioned suggestion will be discussed in another connection, the proposal that all disputes involving an international public servant should be transferred from national to international jurisdiction touches an important aspect of the status of the international servant. Professor Percy Corbett has argued[34] that "international civil servants, like diplomatic agents, must be of a character that will require no exemption from the laws of any civilised country." This argument, if good, would apply with added force to the staff of the I.P.C., which is not, strictly speaking, an international civil service, but a service fulfilling public functions in the employment of an enterprise constituted as a commercial corporation.[35] It is indisputable that the servants of an international institution must not be above the law. Nor, in the absence of an international code of crime, tort and other branches of the law, can there be an objection to the application of the appropriate national law to a tort or crime committed or another legal liability incurred by an employee of an I.P.C. But there is great force in the argument that "if a national court can assume jurisdiction over the private acts of an international official without a waiver of immunity by the international institution concerned, the determination of the official or private character of a particular act

[32] Cf. Basdevant, *Les fonctionnaires internationaux*, p. 262, *et seq.*; Hobson, *The International Institute of Agriculture*, p. 243.

[33] In *Public Administration Review*, Vol. III, p. 103.

[34] *Post-War Worlds*, p. 173.

[35] No argument can be based on the absence of immunities in the case of the B.I.S., which was constituted as a business enterprise without official control or responsibilities.

passes from international to national control."[36] The international administration of public services is a tender plant and needs careful nursing until it is more firmly established. To expose it, even indirectly, to scrutiny and possible sabotage by a multitude of diverse national courts, many of them entirely unfamiliar with the ideas and principles involved, would be likely to harm it greatly. The immunity of international servants from national jurisdiction must extend to the servant's country of origin, although this principle has so far found scanty recognition.[37] The international administrative tribunals must, correspondingly, be clothed not only with adequate jurisdiction, but also with adequate authority and powers of enforcement, as they have already been referred to.[38]

The gradual building up of an international public service, from the administrative co-ordination of a number of I.P.C.s and other international institutions, is linked with many other developments which must be the subject of special study. Of particular importance is the development of training and education systems which will evolve a new type of international public servant. It is clear that at present neither outlook nor experience nor professional training of civil servants, engineers, economists, or lawyers is adequate for such purposes.[39]

4. *Control.*

It has already been pointed out that a control organ, as distinct from the Governing Board and staff of the I.P.C. itself, must be constituted on an interstate basis, that is, represent the different participating states. Two alternative possibilities may be briefly considered. In the case of the London Passenger Transport Board, a proposal to constitute a supervisory organ analagous to the German "Aufsichtsrat," that is, as an organ of the corporation itself, was rejected as being foreign to English and American Law, and as obscuring the functions of the Governing Board.[40] In the case of international corporations, it is even more vital that an organ standing outside the corporation itself should act as link and intermediary between the different participating states and the I.P.C. More debatable is the question of constituting the supervisory organ not on the basis of a purely governmental representation, but with participation of interested economic and social groups. This has been attempted in the case of the I.L.O. with considerable success, but also with increasing difficulties, as divergences in the social structure of the member states made it more and more difficult to nominate delegates from "the most representative" organisations of employers and workers. In the case of the I.P.C. the social groups interested are likely to be much wider and more diverse. They would include banking, industry, farmers, science, and last but not least, the general consumer, unorganised and, therefore, neglected. This fact, coupled with the divergences of internal social structures, would create insoluble problems. The alternative will be to make the national delegations as widely representative of the different sections of the population as possible.

Of the necessity of a permanent supervisory organ there can be no

[36] Jenks, *loc. cit.*
[37] Cf. Secretan, *Brit. Y. B. of Int. Law*, 1935, pp. 56–78.
[38] Above, p. 193.
[39] Cf. On these aspects H. Butler, *I.L.O. Studies and Reports*, Ser. B, No. 29, III, IV; Jenks, *loc. cit.*, pp. 100–1.
[40] Cf. Gordon, *The Public Corporation in Great Britain*, p. 326.

doubt unless the business autonomy, which has led to such unfortunate results in the B.I.S., is to be repeated. Students of the public corporation emphatically agree on the need for some form of public responsibility.[41]

In the case of the I.P.C., the need is reinforced by the necessity of creating an organ standing between the enterprise itself and the constituent countries. As already outlined, the functions of such supervisory organ are essentially those of serving as a link between constituent governments and states, by accepting reports, examining complaints, forwarding suggestions, etc.; to these the functions of a supervising administrative organ would be added, unless these functions would, as suggested above,[42] be transferred to a more general international institution.

The main problem is that of respective national representation on this control commission. The assumption, as stated before, is that the I.P.C. should not become an instrument of domination of an economically and politically powerful state over weaker ones. A Representative in Congress has recently suggested a world bank, to continue, extend, and systematise Lend-Lease, which would be based on gold to be deposited in the United States, and 50 per cent of whose share capital would be held by the U.S.A. It is obvious that any institution of this sort would produce violent reactions on the part of the other states affected by the transactions of such a bank and do great harm to international understanding.

It is, however, no easy matter to find an acceptable alternative.

States are likely to insist on representation in proportion to their financial contribution. As, in my submission, the administration of the I.P.C. itself must be altogether detached from national quotas, the national interest must find an outlet in the control organ. The I.A.B. Draft, which merges management and control in a board of directors formed by national nominees who exercise the national vote, outlines a very interesting alternative by (*a*) giving the eight different groups of states the same number of votes (20) for their minimum holdings, despite the discrepancy in the amount of shares held, in accordance with the great divergences in foreign trade, and (*b*) limiting the maximum vote of any state which acquires additional shares to 50 per cent of the total voting power.

This goes far to prevent any one state from acquiring control over the enterprise.

Conditions will, no doubt, vary according to the nature of the enterprise and the states participating in it. The control problem will be more acute the greater the political implications of the enterprise. It is likely to emerge more sharply in the case of an International Air Transport Board or a Danube Power Scheme than in the case of a mainly scientific and technical Livestock Development Board.

One factor should, however, considerably reduce the problem of the adjustment of the balance as between strong and weak states. The predominant type of I.P.C. is not likely to be the International Bank or Finance Corporation, or even a Clearing Union. Suspicion of finance power exercised by powerful states or interests will militate much more against an international bank which would control international investment and development, than against international corporations formed for a specific constructive purpose, such as Balkan Transport, International Air Services, or Agricultural Reconstruction, and armed with the necessary

[41] Lilienthal and Marquis, 54 Harv. L.R., pp. 568 *sqq*; Gordon, p. 327; Robson, *Public Enterprise*, pp. 381 *sqq*.

[42] See p. 198.

capital and additional powers of raising money. With such corporations, it would be much easier to balance national contributions in land, kind, and services against money contributions. Thus, a Danube Valley Authority needs not only capital, but land, plant, services, experts. Company and partnership law and accountancy practice provide some guidance for the adjustment of money and non-money contributions, though the nature of this type of public international enterprise may demand considerable modifications of the rules developed for private and intra-national enterprises. This method of adjustment will probably prove easier than a maximum limit of voting rights, where participation is in the form of shares. The latter method is apt to be resented by the state affected and give rise to suspicions of its exploitation for the benefit of other states. Where participation is by direct government subscriptions, the problem of control will arise all the same, through claims for proportionate representation on the control commission. It might be avoided where the I.P.C. receives fixed and equal government appropriations and relies, for the remainder, on borrowing powers through the use of the general international market, or where it is able soon to rely on its own earnings and thus to stand on its own feet. This would be no justification for any abolition or relaxation of its responsibility to a control organ, but it would ease the problem of inequality between rich and poor nations.

Ultimately, the solution of this problem, too, will depend on the abandonment of a conception of international relations, for which national prestige, power, and sovereignty is the highest and ultimate value.

Some interesting points emerge from a comparison of the principles of control developed here with the Constitution for an international institution likely to be of outstanding importance in the post-war world.[43]

That U.N.R.R.A. is constituted as a corporate body is certain, for Art. I gives it the power to acquire property, make contracts, manage undertakings, and, "in general, to perform any legal act appropriate to its objects and purposes." A study of its provisions must bear two characteristics in mind which will distinguish this from many other I.P.C.s. Firstly, it belongs to the type of I.P.C. which requires comparatively little capital investment but elaborate organisation. Secondly, as a large-scale measure of relief designed to follow immediately upon military liberation, it demands more direct inter-governmental collaboration than is likely for many other types of I.P.C., entrusted with more technical tasks and demanding long-term capital investment of a potentially profit-making character.

The control provisions of U.N.R.R.A. are dominated, firstly, by the principle of direct government representation; secondly, by the endeavour to realise the principle of equal representation, subject, however, to the special position conceded, on one hand, to the "Big Four" of the United Nations, by virtue of their predominant political and military powers and responsibilities, and, on the other hand, to the principal suppliers of materials.

The principle of equality prevails to that extent that all member governments send one representative to the Council as the "policy-making body" (Art. III, 1), and that all governments directly concerned with particular relief measures will be represented on the Committees of the Councils for Europe and Asia respectively, and also on such other standing regional committees as the Council shall consider desirable (Art. III, 5, 6). But the management is in the hands of a Central Committee which shall

[43] United Nations Relief and Rehabilitation Administration (U.N.R.R.A.). Final Draft in *New York Times*, 24th September, 1943.

consist of the representatives of China, the U.S.S.R., the United Kingdom, and the U.S.A., with the Director-General—appointed by the Council on the nomination by unanimous vote of the Central Committee—as President. The Central Committee, between sessions of the Council, "shall when necessary make policy decisions of an emergency nature." A Committee on Supplies has the function of considering, formulating, and recommending to the Central Committee and the Council "policies designed to assure the provision of required supplies"; it is to consist of the members "likely to be the principal suppliers of materials for relief and rehabilitation." Some states which are not on the Central Committee are likely to be strongly represented on the Supply Committee. This should apply not only to a state like Canada, but also to those of the assisted states which will make vital contributions in the form of land, labour, or other services.

What might be an important step towards the creation of a real international public service is the position of the Director-General, in whom the executive authority is vested, and whose powers, as defined by Art. IV, in addition to his position as President of the Central Committee, are very considerable. Moreover, he is to appoint a deputy, officers, expert personnel, and staff. It will largely depend on the personality of the first Director-General and the use made of these powers whether an international executive, on the lines developed in this paper, will emerge out of this inter-governmental relief organisation.

Art. V pledges all member governments to give support to the Administration, within the limits of their available resources, and subject to the requirements of their constitutional procedure, through contributions of funds, materials, equipment, supplies, and services. The Council has to approve the annual budget submitted by the Director-General, and the total amount "shall be allocated to the member governments in proportions to be determined by the Council."

All these provisions reveal a clearer grasp of the essentials of an international public service than some previous schemes, and also constitute an interesting attempt to combine the principle of equality of nations with the predominant position claimed by certain powers, by virtue of their power, resources, and responsibilities. But the Final Draft has not only greatly weakened the powers of the Central Committee (Big Four) in favour of the Council (all members); it has also—and that is a definite retrograde step—made its activities in any particular territory dependent on the consent of the Government concerned.

But in two respects the U.N.R.R.A. Draft differs from the principles outlined above and falls short of what is submitted must eventually be essential requisites of a genuine I.P.C. Firstly, international management is not clearly divorced from inter-governmental control, although the office of the Director-General might well develop into the nucleus of an international executive of a permanent character divorced from national quotas and voting power. Secondly, and that is the graver impediment, it makes all obligations, financial and others, subject to "the requirements of constitutional procedure." While such a proviso is probably unavoidable in the present state of international society, it is essential that the member governments should treat their obligations as definite, and that national executives and legislatives should collaborate in regarding the constitutional reservation as a matter of form, which, with the integration of international government, will give way to an unconditional international obligation.

5. *International Corporate Status.*

As an international public enterprise, the I.P.C. must have the status of an international legal person. This conception is not unknown to International Law, though its precise meaning is far from clear. The International Institute of Agriculture has been declared to be a genuine international personality by the decision of the Corte di Cassazione, which held Italian Courts to be incompetent to try the action of the Institute's dismissed head cashier for breach of contract.[44]

Whether other international unions have international legal personality, either as a whole or in their permanent offices, is a matter of controversy.[45]

The B.I.S., as a corporate institution, is definitely recognised as an international legal person, although a clear clause giving it "the quality of an international body corporate," provided in the lawyer's draft of 1929, was left out in the final text.[46] But the B.I.S., as well as the I.A.B. Draft, provide for incorporation by national charter (Switzerland in the former, U.S.A. in the latter case). Such a charter, by associating the corporation with a particular state, detracts from its international status and necessitates special provisions to exempt them from various national laws of that state, in particular taxation laws. Such exemption from national taxation has frequently been granted, e.g. to the B.I.S. by Switzerland, to the I.L.O. by Canada (in 1941) and to the proposed I.A.B. by the U.S.A. Nor does such a charter appear to be demanded by practical needs. It is true that English Private International Law, for example, determines the legal existence of a corporation by the law of the country of incorporation[47] and the extent of its powers by the law of domicile.[48] But this is on the basis of a number of different national legal systems, and there is no reason whatsoever why these matters should not be determined by all courts and other instances concerned, according to the by-laws attached to the International Constituent Convention, without reference to any national legal system.

Only outworn tradition and timidity seem to be responsible for the continuation of this practice, in the face of overwhelming disadvantages. These disadvantages are, firstly, logical, for they directly militate against the international status which other parts of the constitution wish to confer upon the corporation; they are, secondly, technical, for the effects of "naturalisation" must be undone by special exemptions; they act, lastly—and this is the most important aspect of all—as a great political and psychological obstacle to the development of international institutions. If even unpolitical and uncontroversial international associations did not wish to avail themselves of the facilities for national incorporation provided by the Belgian Law of 1919, such objections are likely to be much stronger in the case of I.P.C.s with far-reaching political and economic significance. A corporation will at once be tainted with British, American, or some other national character, however international its constitution. The difficulties might be lessened, but certainly not removed, through incorporation in a

[44] See *Annual Digest*, 1929–30, p. 413.

[45] For a survey of the different theories, see Ruffini in *Hague Recueil* (1926), II, 478; Neumeyer, *Revue de Droit International*, Vol. 2 (1924), pp. 356–62.

[46] Cf. Fischer Williams, *A.J.I.L.*, 1930, p. 666; Hudson, *Ibidem*, p. 561; Corbett, *A.J.I.L.*, 1943, p. 219.

[47] *Banque Internat. de Commerce de Pétrograd* v. *Goussakow* (1923), 2 K.B. 682. *Lazard Bros.* v. *Midland Bank* (1933), A.C. 289.

[48] *Risdon Iron and Locomotive Works* v. *Furness* (1906), 1 K.B. 49.

smaller country, to which other objections would be certain to be raised. It is difficult to see why such difficulties should be created without any compensating advantage.[49]

It is, however, necessary to define the international legal status of the I.P.C. more clearly. It can hardly be, as Fusinato has contended,[50] a legal personality operating in a legal sphere of its own. As Anzilotti has objected,[51] it must exist and operate in relation to a number of national legal systems and institutions. Nor can it be on the same level as the states, for, like the corporation within the state, it is limited, in its legal existence, by the powers conferred on it. The I.P.C., like any international institution, can be an international legal person only in the sense that, automatically and as a matter of law, it acquires full corporate status in the countries which, by participating in the constituent convention, agree to its creation. In this sense the international norm impresses itself on the various national laws.[52] A very similar solution has been proposed for international unions in the project adopted by the Institut de Droit International, in 1923.[53] It obliges the contracting states to accord juristic personality in their territories to all unions which fulfil certain conditions specified in the convention. The rights must be the same as accorded by the municipal law to limited companies.

It is in this sense that the international legal status of the I.P.C. must be understood.

A special and almost entirely unexplored problem arises, however, from the dual status of the I.P.C. as an institution fulfilling public international purposes but also engaging in civil and commercial transactions, as a commercial corporation which acquires land, buys and sells goods or services, employs contractors and labourers, and may engage in any activity of a commercial and civil character. In its former capacity the I.P.C. moves in the sphere of government and public law, in its latter capacity it moves in the sphere of commerce and private law,[54]

It is clear that, in this latter sphere, the I.P.C. must be justiciable and be subjected to the laws properly applicable to the transaction in question.[55] In the absence of any international code of private law, some generally accepted rules of Private International Law might be agreed to by the participating states. The problem reduces itself, for practical purposes, to three types of transactions—

1. Legal questions relating to land, for which the *lex rei sitae* is the proper law.

[49] The proposals for an International Clearing Union, which do not go into legal detail, propose executive offices in London and New York, with the Governing Board meeting alternately in London and Washington. A suggestion made to the author, by Mr. Jenks, that international areas, such as the Vatican City, or the District of Columbia in the U.S.A., might be created as seats of International Public Corporation, would be likely to meet with different, but hardly less formidable, difficulties.

[50] *Avis sur les questions touchant la personalité juridique de l'Institut International d'Agriculture* (1914).

[51] *Rivista di divitto internazionale*, VIII, pp. 156–164

[52] Cf. similarly Van der Lühe, *Die internationale juristische Person*, 1931, 76–84; Schwarzenberger, *loc. cit.*, p. 58.

[53] *Annuaire*, Vol. 30, pp. 97, 120 *sqq*; cf. Normandin, in *Répertoire de Droit International*, Vol. II, 103.

[54] Cf. for the B.I.S., which did not develop this dual activity, short observations by Fischer Williams and Hudson, *loc. cit.*, Committee of Experts on Reparations, para. 54; Corbett, *A.J.I.L.*, 1943, 219.

[55] Cf. Sec. 7, proposed Charter of the Inter-American Bank.

2. Unlawful interference with private interests, for which the *lex loci delicti commissi* is appropriate.

3. Contracts, for which the "proper law" of the contract is appropriate.[56] Here, unification and consistency can, no doubt, be attained by the elaboration of standard terms, in contracts to which the I.P.C. is a party, by reference to a particular system of law or set of legal principles, coupled with reference to a particular court or tribunal of arbitration.

It is a very different question whether reference to national laws should imply national jurisdiction. The arguments discussed above with reference to jurisdiction over servants of international institutions apply to the transaction of such institutions. Reference to a multitude of different national courts of all grades would emphasise diversity and work against the establishment of stable legal principles. A properly staffed and equipped international court, competent to try all disputes to which the I.P.C. is a party, would, on the other hand, have a unique opportunity of developing a progressive administration of comparative law, and evolve a stable set of principles leading eventually to a number of modifications of private law. The difficulties presented by the applications of different national legal systems are much less formidable than is often supposed, for the alleged divergences, especially between the Anglo-American and the Continental legal systems, have been very greatly exaggerated.[57] The desirability of referring all matters concerning the I.P.C. to an international court is reinforced by the fact that the national and international spheres cannot be kept quite separate. The I.P.C. must be justiciable and judgments against it enforceable. But it would be intolerable to admit bankruptcy proceedings with the purpose of compulsory winding-up in national courts. Nor can other grounds of dissolution be tested otherwise than by proceedings before an international court. It would, however, lead to grave inconveniences to have some civil proceedings before national and others before international courts.

The question of *ultra vires* acts, for example, which may be incidental to any action for damages, in contract or tort, essentially concerns the use, by the I.P.C., of its powers and functions, and should be dealt with not by a multitude of national courts but by one international tribunal.

The need is for an international court whose judges adequately represent the different relevant legal systems, and which is equipped with full powers to ensure the enforcement of its judgments and orders, in co-operation—as far as enforcement is concerned—with the appropriate national organs.[58]

[56] Cf. for the meaning of this term, Cheshire, *Private International Law*, 2 ed., p. 250 *sqq*. For similar proposals in regard to international unions, *Project of Institut de Droit International*, above, p. 204.

[57] Cf. for a detailed examination, Lauterpacht, *The Function of Law in the International Community*, 1933; Friedmann, *Canadian Bar Review*, 1942, p. 175 *sqq*.

[58] The compromise suggestion, in the Draft Convention for International Unions adopted by the Institut de Droit International (Art. 18), that winding up for improper use of capital and revenue and for notorious insolvency should be in the hands of the Permanent International Bureau, on application by an interested party, while activities contrary to a national "ordre public" can be the cause for compulsory winding up by national courts, with appeal to the Permanent Court of International Justice, represents a modest but impracticable deviation from this principle. The I.A.B. Draft, on the other hand, following its proposal for a national Charter, declares the I.A.B. to be justiciable before any district court of the United States (Charter, Sect. 7).

## IV. Some Conclusions

It cannot be emphasised too strongly that the I.P.C., like any other international organisation, cannot be expected to flourish unless certain fundamental political conditions are fulfilled. The most vital of all is that the host of constitutional reservations, national tariff or currency restrictions, judicial sovereignties, national allegiances, and all the other symbols of absolute national sovereignty should not be allowed to impede the development and working of such institutions. Whether that will be the case or not is as yet an open question, and one which it is not within the province of this paper to discuss. But that no effective development of international co-operation, in economic matters, can be hoped for without the fulfilment of this condition, is a conclusion arrived at by all those who have attempted to study concrete problems of post-war reconstruction.[59] Mr. Jenks concluded a penetrating legal study of the financing of international institutions with the following observation[60]—

> "If existing national constitutional arrangements, rules of law and budgetary methods are to be taken as granted, and new international developments are to be required to be consistent with a host of divergent and frequently conflicting national practices and prejudices, there can be no substantial change in the present structure of international society and the international anarchy must continue unabated."

More recently, the official proposals for an International Clearing Union have said this—

> "A greater readiness to accept super-national arrangements must be required in the post-war world. If the arrangements proposed can be described as a measure of financial disarmament, there is nothing here which we need be reluctant to accept ourselves or to ask of others. It is an advantage, and not a disadvantage, of the scheme that it invites the member states to abandon that licence to promote discipline, disorder and bad-neighbourliness which, to the general disadvantage, they have been free to exercise hitherto."

If this condition is fulfilled the I.P.C. may play an important part as an institution particularly suited to the present phase of international relations; a phase in which the need for an intensification of international relations as an alternative to international anarchy is as obvious as, in the words of the Resolution adopted by the Grotius Society,[61] the necessity "that international law should embrace economic and social as well as political matters."

The revolution in international relations, through the transfer of a multitude of economic matters from private to public responsibility, is bound to have a profound effect upon International Law,[62] but it may express itself in one of two ways—

1. By a direct assumption of responsibility for economic relations by

[59] Cf. for a distinguished economist's view, Condliffe, *Agenda for a Post-War World* (1942), *passim*.

[60] *Grotius Soc.*, Vol. 28, p. 129.

[61] *The Future of International Law*, 1942, Rule 7.

[62] Cf. on this question, W. Friedmann, "The Growth of State Control over the Individual," *Brit. Yearbook of Int. Law*, 1938, p. 117, *et seq.*; *The Disintegration of European Civilization and the Future of Internat. Law*, 2 Mod. L.R. 177; *What's Wrong with International Law* (1941).

the state. This, from the point of view of International Law, meets with the serious difficulty that the transfer proceeds with unequal speed and intensity in different countries, with a consequent disruptive effect on International Law.[63]

2. On the other hand, the constitution of relatively autonomous international institutions creates a kind of middle ground on which countries with differing social and economic structures can meet for the carrying out of specific tasks, provided, of course, that they accept the minimum responsibilities which any kind of effective international co-operation demand. Here the I.P.C. opens up considerable prospects, and they are reinforced by the widespread aversion against a general super-national government, world constitutions, world economic councils, and so forth, which undoubtedly prevails in many countries and among many people. This is not to say that this aversion has any rational justification or that anything short of international government will be adequate to stem international anarchy. But the existence of this state of mind is a psychological fact of great importance, and the possibilities of starting international reconstruction through international institutions built round a specific purpose correspondingly gain in importance. In the words of a recent report on American conditions, "many who would tear up a paper plan would hesitate to tear down an organisation seen to be efficient and beneficial, an organisation, moreover, which is supported not by politicians but by technicians.[64]

But it should not be imagined that such specific institutions can be an adequate substitute for wider conceptions of international government. This study has, I hope, made it clear that an I.P.C. cannot function properly unless it is based on a far-reaching measure of inter-governmental co-operation in many spheres. Nor will much be achieved if every I.P.C. is considered as an isolated unit, competing perhaps with another one, through different governmental or inter-governmental agencies. It is not only the establishment of general international administrative and judicial institutions which must logically follow from the establishment of a number of I.P.C.s, but a co-ordination and far-reaching development of international economic, political, and legal relations.

W. Friedmann.

[63] *Brit. Yearbook, loc. cit.*, p. 134, *et seq.*
[64] "The Great American Debate," *The Times*, 29th May, 1943.

# THE INTERNATIONAL POSITION OF DISPOSSESSED GOVERNMENTS AT PRESENT IN ENGLAND

## I

UNDER the doctrine of non-recognition which, although controversial in some of its aspects,[1] is an integral part of modern international law,[2] belligerent occupation does not affect the sovereignty of the occupied state. It follows that the governments of the countries occupied by Germany remain the sovereign governments of their countries even in exile.[3] No recognition of this fact by foreign powers in general and by the power in the territory of which the exiled government has found asylum in particular is necessary. Only in so far as the position of the bodies instituted in foreign territory and claiming to be the legal governments of their countries is not in accordance with their constitutional law (e.g. the Government of the Netherlands cannot comply with the provision of the constitution that the seat of the government must be on Dutch soil; Belgium is a monarchy, but without a sovereign at present because King Leopold remained in Belgium as a prisoner of war), the exiled government must be recognised by the territorial government as capable to exercise sovereign power. It is apparently for this reason that the expression "recognised" is used with regard to the relations between the U.K. and the Netherlands. As the Attorney-General pointed out in the second Amand Case,[4] H.M. Government "recognise H.M. Queen Wilhelmina and her Government as the Sovereign and Government of the Netherlands and as exclusively competent to perform the legislation, administration, and other functions appertaining to the Sovereign and Government of the Netherlands."

## II

For the government of the country where the dispossessed government want to establish themselves and to carry on their functions still a further act is necessary. No foreigner is allowed to take up residence in the territory of a foreign country without the consent of the Government of this

[1] Lauterpacht, the problem of non-recognition (Part II of Quincy Wright and others: *Legal Problems of the Far Eastern Conflict*).

[2] Oppenheim-Lauterpacht, *International Law*, I, p. 141, II, pp. 138 and 158. There is one dissenting author: Professor Edwin M. Borchard (*The Doctrine of Non-Recognition*; Part III of the work quoted in note 1) denies the doctrine very emphatically. He considers it as "destitute of constructive value" (p. 159) and "like a prescription for general disorder" (p. 176). But this view is not adopted by any other contributor to that work, and it must be borne in mind that Prof. Borchard is a very outspoken representative of the functional approach to international law.

[3] This view is generally recognised. See besides the standard textbooks: Drucker: "The Legislation of the Allied Powers in the United Kingdom" in *Czechoslovak Yearbook of International Law*, p. 45 ss. Oppenheimer: "Governments and Authorities in Exile," *American Journal of International Law*, Vol. 36, p. 568 ss. It may be interesting that the German Supreme Court, in Pre-Nazi Germany, of course, took the same view (*Fontes juris Gentium*, Ser. A. Sec. II, Vol. I, p. 486). In *The American Journal* l.c. p. 346 a book is reviewed: André Jumeau: *Le Refuge du Gouvernement à l'Étranger*. This book has not been available to me.

[4] Decision of King's Bench Division. All E.L.R., 1942, p. 236 ss. See also note 11 below.

country. That is true for a private person, that is true also for members of foreign governments. But even after the grant of this consent, which in the case of the dispossessed governments has been given in the form of an invitation tendered to the dispossessed governments by the British Government, the problem is not yet exhausted. Once they have been authorised by the British Government to establish themselves within the U.K., the Allied Governments are entitled to all privileges which the law of nations confers upon sovereign governments, particularly to extraterritoriality: they cannot be sued before the Courts of their sovereign host, they are not obliged to pay taxes, etc., etc. The Diplomatic Privileges (Extension) Act, 1941, extends to members of an Allied Government established in the U.K. the diplomatic immunities and privileges. As for the exercise of their sovereignty within the territory of the territorial government the exiled governments can do so in so far as their respective act does not, so to speak, take effect within the British territory. The Allied Governments can, for instance, accredit diplomatic representatives with foreign governments; such an act, though done within the U.K., does not take effect there. The situation is different with regard to acts which, so to speak, will materialise in the U.K., as the raising of an army, the establishment of courts,[5] the collecting of taxes, etc. The mere invitation to establish themselves within the U.K. does not cover such acts. The foreign government needs an express consent of the British Government to perform such act[6] and such consent, in so far as it has been given, is given in the form of a British statute, as e.g. the Allied Forces Act, 1940, or the Allied Powers (Maritime Courts) Act, 1941.

By virtue of such Acts a peculiar situation has arisen: a sovereign government has been authorised by another sovereign government to exercise its sovereignty to a certain extent within the territory of the latter government. Such consent, by which the authorising government does not give away some part of its own sovereignty,[7] must not be confounded with the recognition mentioned above. This consent is necessary even with regard to governments which, being in accordance with all the provisions of their constitutional law, do not need a recognition, and on the other hand recognition, necessary in so far as there is some irregularity, would not confer to the recognised government the right to exercise their sovereignty within the U.K. A state must not perform acts of sovereignty in the territory of another state, unless by consent of the government of this country, and it derives the right to do so from this consent.[8] Can such a consent be construed as a delegation of power by the territorial sovereign to the foreign sovereign? It is true that sovereignty extends not only to the nationals of the respective government, but also to foreigners residing in the territory.[9] But this sovereignty with regard to foreigners residing within the territory is restricted as compared with the sovereignty over

[5] "But this jurisdiction" (namely the jurisdiction of a foreign government) "is only possible as far as it is authorised by the British legislation and can only be exercised in accordance with the statutory provision referred to and subject to the conditions and safeguards specified by statute." (Judgment of the House of Lords of 13/17 VII and 6 VIII, 1942. *The Law Times*, vol. 167, p. 177 ss. per Lord Wright).

[6] Satow, *Diplomatic Practice*, s. 359.

[7] *Cf.* decision Note 4 at p. 242.

[8] Oppenheim-Lauterpacht I, p. 241.

[9] *quidquid est in territorio, etiam est de territorio* (Oppenheim-Lauterpacht, ss. 125, 170).

their own nationals. Public international law does not allow e.g. a government to compel foreigners residing in their territory to military service.[10] No government can delegate a right which they do not possess themselves. Thus the Dutch Government cannot acquire—by way of delegation—the right to call their subjects, residing within Great Britain, to the forces from the British Government who do not possess this right. Furthermore, I think, it was not the intention of the British Government when the Allied Forces Act or the Allied (Maritime Courts) Act were passed to confer rights to the Allied Governments they did not possess before. What the British Government had in mind when passing these Acts was not to confer upon the Allied Governments new powers not possessed before, but only to authorise the Allied Governments to exercise their powers, if any, within the U.K. What such powers are is not ascertained by the Acts of the English legislation, but has to be found elsewhere. That this is the underlying idea, e.g., of the Allied Forces Act is shown by the wording of Section 1 (1) under which foreign courts are authorised to exercise within the U.K. such powers as are conferred upon them by the law of their country, and the same idea has been formulated in the first Amand Judgment"[11] by the Lord Chief Justice, who said that the Dutch Government did not hereby, namely by the recognition by H.M. Government as the sovereign Dutch Government, acquire any powers over Netherland subjects not otherwise possessed by them according to Netherland law.

The various judgments in the Amand Case are not the only ones which deal with the situation that two sovereign governments exercise their sovereignty within the same territory, the one being the territorial, the other being a foreign government to which the territorial government have given their consent. *Annual Digest* 27/28 Case No. 90 and 29/30 Case No. 65 deal with the contingency, frequent between two neighbour states, that the customs offices of one of them exercise their function on the territory of the other. Under an agreement between Germany and Switzerland Germany was authorised to examine the luggage of passengers on a part of the railway station in Basle, i.e. on Swiss territory. The Court held that by virtue of the consent of the Swiss Government the German Government exercised their sovereignty in the station situated within Swiss territory, pointing out that a state is at liberty to give up part of their sovereignty so long as they retain a certain residuum of it. Still more to the point is a decision of the Court of Appeal in Rome.[12] The Government of Montenegro had found asylum in Rome after the occupation of Montenegro by the Serbian Forces and the question arose whether the Montenegrin Government was authorised to exercise their sovereignty on Italian soil. The Court held that in certain historical circumstances a state may exist outside his natural boundaries and still preserve the character of a person in public international law and added that, if a recognition of the Montenegrin Government by the Italian Government would have been granted, the

[10] Oppenheim-Lauterpacht I, pp. 237 and 542.

[11] (1941) 2 K.B. 239. Amand's writ for *habeas corpus* was again refused by the Divisional Court of the King's Bench, 1 All E.R. 236 (see note 4). Appeal against this decision dismissed by the Court of Appeal on the ground that, it being a criminal case, the Court had no jurisdiction. Confirmed by the House of Lords (58 L.T.R. 382). See for further details *Law Quarterly Review*, vol. 59, pp. 110–11. *Cf.* also two Canadian decisions, *Re de Bruijn, Re de Romeijnsen*, 1942, 1 D.L.R. 249, and the South African case of *Haak* v. *Minister of External Affairs* (59 *South African Law Journal* 313); in all these cases the conscription of Dutch nationals was equally dealt with.

[12] *Annual Digest*, 1927/28, Case No. 106.

Montenegrin Government would have been in a position to exercise their sovereignty on Italian soil. The following sentences of the decision may be quoted: "The Government . . . in order to be able to exercise the rights of sovereignty derived from the principle of extraterritoriality with regard to its political and administrative functions . . . must be enjoying full and formal recognition." But the Court was not satisfied that an Act had been passed by the Italian Government "establishing the fact that the Government had been allowed to transfer its residence to Italian soil with the express consent of the territorial Government, and to exercise there all governmental functions on exactly the same footing as if it were still within the boundaries of its own territory."

III

The results obtained so far are the following: The dispossessed governments remain the legitimate governments, even if they take up residence abroad. With the consent of the territorial government they can exercise their sovereignty within the territory of the latter.

With regard to the extent of such sovereignty, it should be pointed out that it is not necessary that the territorial government authorises the dispossessed government to exercise the sovereignty without any restrictions. The meaning of the last sentence of the judgment of the Court of Appeal in Rome, quoted above, is perhaps not absolutely clear. The Court held that the consent of the territorial government must authorise the dispossessed government "to exercise all governmental functions on exactly the same footing as if it were still within the boundaries of its own territory." That can be understood to mean that the dispossessed government can act only provided the territorial government authorises it to exercise *all* governmental functions. I submit that such opinion, if it should be the opinion of the Court in Rome, would not be justified. I do not see any reason why a territorial government should not have the right to allow the dispossessed government to exercise only some of the rights generally connected with a sovereign government. If exercising of governmental functions by a dispossessed government is dependent on the consent of the territorial government, why should the territorial government not have the right to consent to the exercising of a part of the sovereign functions only? The British Government has done so in actual fact. The Allied Forces Act as well as the Allied (Maritime Courts) Act contain some restrictions with regard to what the Allied Governments are allowed to do on British soil. The Allied Governments do not, of course, lose any parts of their sovereignty by virtue of such Acts, but in consequence of them only parts of their rights can take effect on British soil. The wording of Section 1 (1) of the Allied Forces Act, 1940, is significant: it authorises the foreign government to exercise within the U.K. the powers conferred upon them by their national law, but only "subject to the provisions of this Act."

IV

Two other questions have arisen with regard to the exercising of sovereign powers by foreign governments on British soil, viz.: (1) Whether the Courts of the territorial government are called upon to examine the validity of the acts of the dispossessed government? (2) If so, what law governs this question?

Question 1 was raised in the Amand Cases; counsel for the defence submitted that the decree of the Dutch Government under which the defendant was called to the forces was invalid, because the Dutch Parliament had not given their consent thereto. For the prosecution it was submitted that the Court had not the right to examine this question, but that the mere fact that the government had issued such a decree was conclusive evidence for the validity of the decree. The Court did not adopt this latter view. It would indeed be surprising if, while the British Courts undoubtedly have the right and the duty to examine the validity of British legislative measures, they would be in a different position with regard to acts of foreign sovereigns.[13] On the other hand it has been frequently held[14] that a court will not look into the validity of the act of a foreign government. I have always found it difficult to understand the real meaning of this rule. The first case in which such view was taken was the case in which a Russian company limited by shares had been nationalised and the shareholders deprived of their rights. It had been submitted by counsel for the shareholders that such a confiscation was illegal, but not in the meaning that the decree for the nationalisation was not passed by the competent authorities, but that the confiscation was void, because contrary to elementary principles of law. The Court[15] when refusing to examine the validity of the nationalisation decree had apparently only the latter point of view in mind. When it held that a British Court had not to look upon the legality of the act of a foreign government, it referred to the substantive, as distinct from the formal, validity of the act of a foreign government. Whether the act emanates from the competent authority, whether the authority has power to emit such an act, has to be examined by the British Court, but whether the act in itself is legal is not for a British Court to examine; in other words a British Court can and must inquire as to the formal validity of acts of foreign governments and their legal nature, but has not to examine the substantial validity.[16] This applies at least to an act of a foreign country which deals not with persons and property inside its own territory, but with persons or property living in or situated in the U.K. With regard to such acts of a foreign country the courts of the U.K. have the right and the duty to inquire into their legality.[17]

Question 2. If the submission set out above, viz. that the dispossessed government exercises its own sovereign power and not the sovereign power of the territorial government, is correct, the question arises how the extent of the power can be ascertained. It was this problem which the Courts in the two Amand Cases had to deal with. The Court[18] dealt with it only from the point of view of municipal Dutch law and the Courts examined whether

[13] *Cf.* McNair in *Law Quarterly Review*, 1941, p. 69.

[14] *Cf.* McNair 1, c.p. 70, Note 94.

[15] *Luther* v. *Sagor* (1921), 3 K.B. 532. In the same sense: *Princess Palay* v. *Weisz* (1929), 1 K.B. 718.

[16] *Cf.* McNair, p. 70, Note 94, and, in addition to the decisions quoted there, *Lorentzen* v. *Lydden & Co., Ltd.*, (2, XII, 1941, 71), *Lloyd's List Law Reports* (1942), p. 197. Reference may also be made to the decision of the New York Court of Appeals *re Andersen* v. *Transandine, American Journal*, 36, p. 701ss.—Benes (*Czechoslovak Yearbook*, p. 221) and Taborsky (*ibidem*, p. 190) do not agree with the view that the legality of acts passed by exiled governments has to be examined by an English Court.

[17] *Cf.* decision cited above, p. 243 (per Wrottesley, J.), Abel, *ibidem* VI, p. 166, and Mann, *Law Quarterly*, vol. 59, pp. 42ss. and 155ss. McNair 1, c.p. 57, Hartmann in MODERN LAW REVIEW V, p. 260.

[18] *Cf.* decisions quoted Note 11.

under Dutch constitutional law the Dutch decree, calling up Dutch subjects residing in Great Britain to the Forces, was valid although the consent of the Dutch Parliament was lacking. If such kind of approach is the correct one, the question is no question of international law, but has to be answered according to the constitutional law of the country involved, and according to that constitutional law the government of one country may be authorised to pass decrees which the government of another country would not be entitled to. That would depend on the general constitutional law of the respective country and on the particular measures which have been taken before the respective country was occupied by the enemy, as they have been taken e.g. by the Norwegian legislature before the whole country was occupied by the German army. Generally there was not sufficient time to take such measures. As for the constitutional law in general, some constitutions contain provisions that when Parliament is not assembled the executive can take emergency measures subject to ratihabition by the Parliament as soon as it assembles again. But such provisions, should they be contained in the constitution, are not always sufficient to help us over the difficulties. In the Dutch case e.g. the difficulty of the Dutch Government for passing legislation does not consist only in the absence of Parliament, but also in the fact that the seat of the Government is on British soil whilst under the Dutch constitution it ought to be on Dutch soil. In the case of Belgium not only the Belgian Parliament is missing, but also the head of the state because, as mentioned above, the King has remained in Belgium as a prisoner of war. It is not surprising that there are no express provisions in the constitutions to remedy these difficulties. It would indeed be a strange idea for a constitution to stipulate what the government is authorised to do should it be ousted from the territory by enemy action. I do not know any example where a constitution provides for such an emergency.

In my submission the remedy can be found in public international law. As pointed out above, the doctrine of non-recognition is a recognised principle of the law of nations. The government though ousted from its territory remains, according to that doctrine, the legitimate and the only legitimate government of the invaded country. It is only a logical consequence of that principle that the government must be empowered to carry on, even if, because of the invasion, not all the conditions provided for in the constitution can be fulfilled. If public international law considers the dispossessed government to be the legitimate government, the government must have the right to dispense with such provisions as cannot be complied with because of the very invasion. Otherwise the principle of non-recognition would have exclusively theoretical value. What would it help to still recognise the government as the legal government, if they were deprived of the possibility to exercise the sovereignty through the very facts which according to public international law are not conducive to end their sovereignty? The case of the Dutch Government is very illustrating: according to Dutch constitutional law the seat of the government must be on Dutch soil. The Dutch territory has been invaded by the enemy. If nevertheless the provisions of the Dutch constitution must be adhered to, the Dutch Government would not be able to act as sovereign, whilst public international law confers on them the right and, by implication, the duty to exercise the sovereignty in spite of the invasion of Holland. That cannot be the meaning of this rule of public international law. The meaning must be, unless the rule were confined to a mere formality, that such provisions

of constitutional law as the very invasion renders impossible to fulfil, can be dispensed with, but only such provisions, and no others. If e.g. constitutional law provides that decrees of the head of the state must be countersigned by a responsible minister and the signature of the minister is available in spite of the invasion, a decree of the head of the state would be invalid unless signed by the minister, but if, on the other hand, the head of the state should have escaped alone and without any of his ministers, he must have the possibility of nominating new ministers without a countersignature, as such countersignature has become impossible, because of the invasion. Once a new minister or new ministers have been appointed the necessity of countersigning comes again into existence. The possibility of dispensing with provisions of the constitutional law is confined to such provisions which it has become impossible to observe through the invasion.

One can perhaps raise the following objection: granted even that public international law constitutes the rule set out above, such rule would not be helpful to overcome the difficulties of the municipal constitutional law of the respective country, because public international law is not a part of the municipal law. I submit that such an objection would not be justified. I am not concerned with the well-known controversy in public international law whether the latter is as such part of the law of the land: the divergency between the monistic doctrine and the dualistic point of view. According to the latter, municipal courts must apply municipal law, even if it conflicts with the law of nations, whilst the monistic doctrine holds that in case of conflict between the law of nations and municipal law it is the law of nations that prevails. However, even the adherents of the dualistic point of view hold that in case of a gap in the statutes of a civilised country regarding certain rules necessitated by the law of nations such rules ought to be presumed to be tacitly adopted by such municipal law.[19] Our problem, viz. whether a dispossessed government can act if the constitutional provisions cannot be complied with because of the invasion, represents such a gap in the constitutional law. It is not usual for a constitution to provide for such a contingency. The gap is filled by the law of nations. The latter contains a principle that the dispossessed government remains the sovereign government and by implication that the dispossessed government, in so far as the invasion of their country renders the fulfilment of the constitutional provisions impossible, is not obliged to observe such provisions. That rule is a rule of public international law, but it applies to the municipal constitutional law, because of the presumption that municipal law is in accordance with the law of nations. Public international law is in my submission a safer foundation for this rule than the rather vague recourse to considerations of expediency, emergency, etc., which are to be found in articles of learned authors,[20] and which also were adopted by one of the experts in the Amand Case. Considerations as such volunteered by one of the experts, that legislation must continue in the interest of the life of the state and that in an emergency the constitution does not apply first and foremost, but the vital interest of the state and the people, are in my opinion not without danger, because this point of view would justify almost any governmental

[19] Oppenheim–Lauterpacht, I, s. 22, p. 41, and *Annual Digest*, 27/28, Case No. 4: "It is a general principle of interpretation that municipal law must in doubtful cases be interpreted in such way as to ensure its conformity with the international law."

[20] Oppenheimer in *American Journal of International Law*, 36, p. 582, Drucker l.c. p. 49.

act. We need a point of attachment in the positive law and this point of attachment is in my submission the doctrine of non-recognition contained in the law of nations. That point of attachment is more helpful, as it furnishes a line of demarcation for the powers of the dispossessed government which, if only based upon general considerations of expediency and emergency, would be without distinct limits. Whether the Government, having been compelled to transgress its powers by the invasion, has to seek ratification once the occupation has come to an end is a question with which I am not concerned, as it is a question not of international law, but of municipal constitutional law.[21]

V

I sum up my views in the following principles—

1. A government of a country invaded by the enemy remains the legitimate government, even if it takes up residence abroad.

2. Recognition of such a government by foreign governments is necessary only in so far as the position of such government is not in full accord with its constitutional law.

3. The government needs the consent of the territorial government to exercise its sovereignty within the territory of the latter, and can act on foreign soil only in so far as that is covered by the consent of the territorial government.

2. The consent of the territorial government does not confer to the dispossessed government any constitutional rights or powers they do not possess under their own constitutional law. On the other hand, in so far as conditions provided for in the constitutional law cannot be complied with owing to the occupation of the country by the enemy, a dispossessed government can act without being compelled to fulfil those conditions.

DR. ERNST WOLFF.

[21] Under English law an Act of Indemnity would be necessary (Dicey, *Introduction to the Study of the Law of the Constitution* (9th ed.), pp. 412–13).

# THE INHERITANCE ACT AND THE FAMILY

THE unrestricted freedom of testation which existed in English law until 1938 was one of its most distinguishing features. It was remarkable also for the mystery surrounding its origin and the uncertainty as to its social significance. Although connected with many sides of social life, the relation of the rule to the family is clearly of outstanding importance. This relation is one of action and reaction, the course of legal development being determined by, and in turn affecting the character of, the family. This article, which arose out of an investigation of the effect of modern social legislation on the family,[1] accordingly deals separately with the question of the extent to which the abandonment of unrestricted freedom of testation can be attributed to changes in the family, or in legal policy towards the family, and the question of the effect on the family produced by the Inheritance (Family Provision) Act, 1938.

[1] This investigation was undertaken for the Social Research Division of the London School of Economics and Political Science, and this article is published by kind permission of the Director and the Social Research Division of the London School of Economics and Political Science.

The Act undoubtedly confirms the social importance of the family. Whether the change in the law reflects a change in the legal attitude towards the family depends, therefore, upon whether the absence of restraints on the power of testation indicates lack of concern for the interests of the family, or, ultimately, whether the power of testation is opposed to those interests.

The existence of such a conflict between the power of testation and the interests of the family seems to be assumed by the commonly held opinion that the absolute freedom of testation in English law must be considered against the background of the practice of executing marriage settlements.[2] By this practice the danger to the family arising from the power of testation was removed but the existence of the danger was admitted. Marxist theory,[3] which contends that in capitalist society the character of the family is determined by the necessity of preserving private property, refused to agree to this assumption of conflict between the family and private property, of which the power of testation is an essential incident. The attempt to explain this extreme development of the incidents of private property as derived from the strong dislike of restraints of any kind which forms part of the English national character was rejected[4] and another theory of the significance of the unrestricted freedom of testation in English law, by which the assumption of conflict between this rule and the family could be avoided, was developed.

According to Engels,[5] the characteristics of the family in capitalist society, following from its purpose of maintaining private property, are monogamy, male supremacy, and arrangement of marriage as one of convenience by the parents. This last characteristic is achieved and reconciled with the fictitious concept of a free marriage contract by the imposition of the requirement of parental consent in the countries in which an obligatory share of the paternal inheritance is secured to the children, whereas "in the countries with English law, where parental consent to a marriage is not legally required, the parents on their side have full freedom

[2] See Wedgwood, *The Economics of Inheritance* (Pelican Ed.), pp. 93–100; Hoeck, *Die Testierfreiheit und ihre Beschränkungen im Britischen Reich*, p. 4; Maine, *Ancient Law*, Chap. VII, discussed below.

[3] The possibility of attributing to Marxist theory an interpretation of the principle of freedom of testation in accordance with what would have been described by Marx as "vulgar" materialism is prevented by the following remarks contained in a letter by Engels to Conrad Schmidt, written in 1890 (Marx-Engels, *Selected Correspondence*, 1934, London, at p. 482): "The basis of the law of inheritance—assuming that the stages reached in the development of the family are equal—is an economic one. But it would be difficult to prove, for instance, that the absolute liberty of the testator in England and the severe restrictions imposed upon him in France are only due in every detail to economic causes. Both react back, however, on the economic sphere to a very considerable extent, because they influence the division of property." This opinion is, however, not supported by Wedgwood, who states (*op. cit.*, at p. 99) that "the difference between the degree of concentration (of property) in the two countries is not . . . very important. . . . Nor can the difference, such as it is, be ascribed entirely, or even mainly, to the different laws of inheritance." See also Gold, *Freedom of Testation*, 1 Mod. L. Rev., 296–7.

[4] Cf. the following remarks in 2 Pollock and Maitland, *History of English Law*, p. 355: "To the modern Englishman our modern law, which allows the father to leave his children penniless, may seem so obvious that he will be apt to think it deep-rooted in our national character. But national character and national law react upon each other, and law is sometimes the outcome of what we must call accidents."

[5] *The Origin of the Family*, Chap. II, esp. at pp. 65 ff.

in the testamentary disposal of their property and can disinherit their children at their pleasure."[6]

It is doubtful whether this ingenious suggestion would stand the test of an historical and comparative investigation of the requirement of parental consent. The validity of the fundamental contention of the absence of conflict between the family and the power of testation can, however, be determined by considering the power of testation not against the background of the laws and customs concerning parental consent to marriage or marriage settlements, but in the more natural context of the law of succession.

The essence of the power of testation is the regulation of succession by the autonomy of the individual instead of by the general law; it is the power to contract out of the law of intestate succession, and the meaning of restrictions on this power is determined by the character of the policy embodied in the rules of intestate succession. The extent of the danger to the family constituted by unrestricted freedom of testation depends, therefore, upon the degree of protection afforded to the family by the law of intestate succession. Apart from the claim of the state to a share of the inheritance, which can here be disregarded as it arises in the case of testate as well as intestate succession, modern rules of intestate succession are designed on the basis of the prevailing opinion of family sentiment and obligations, they "attempt to express the family in terms of property."[7] Where this attempt has been successful freedom of testation is considered as a threat to the interests of the family, and is, therefore, subjected to restraints. That the existence of restraints on the power of testation indicates satisfaction with the law of intestate succession is also shown by the fact that these restraints are sometimes modelled on the rules on intestate succession so as to secure partial application of these rules even in the case of testamentary succession.[8] Satisfaction with the rules of intestate succession will also lead to reluctance to exercise the power of testation. It is difficult to estimate and account for the unpopularity of wills, as numerous factors may contribute to this result. Thus, apart from the character of the law of intestate succession, the distribution of wealth, the incidence of family settlements and the character of matrimonial law, the expense of making wills, the complexity of the rules relating to formalities, proof and interpretation, etc., must be considered. But there is reliable evidence of, for instance, the unpopularity of wills in France. Thus, Maine,[9] having remarked that "in France at this moment, the heads of families generally save themselves the trouble of executing a will," also points out that the authors of the French Codes in their desire to establish "equal distribution of property among children at the parent's death" instead of primogeniture, which they considered as one of the foundations of "the social fabric which they determined to destroy," "almost expelled testamentary succession from the law."[10] Maine's remarks are confirmed by the more recent observations of Amos and Walton,[11]

[6] *Op. cit.*, p. 78.

[7] Plucknett, *Concise History of the Common Law*, 3rd ed., at p. 639.

[8] This is most obvious under German law, explained by Kahn-Freund in 1 MOD. L. REV., 304 ff.

[9] *Ancient Law*, 1930, pp. 244–5.

[10] *Op. cit.*, pp. 250–1.

[11] *Introduction to French Law*, at p. 306, quoting Josserand, *Cours de Droit Civil Positif Français* (1930), for the information that "in 1928 about four-fifths of all successions were intestate."

who state that "the small proportion of Frenchmen who make wills is perhaps an indication that the legal rules of succession are considered satisfactory."

The "attempt to express the family in terms of property" through the rules of intestate succession is, however, not invariably successful. The conception of the family, its legal definition, the relative position of its members, its function in the economic and social structure of society changes. The law of intestate succession may fail to keep pace with those changes, or, from its inception, it may have been formed under the pressure of interests other than those of the family. If the rules of intestate succession are unsatisfactory from the point of view of the family, the power of testation assumes the character of an instrument serving for the protection of the family. If the distribution of the intestate's property is not in accordance with the wishes of the family the power of testation becomes, not the means of effecting disinherison, but the method for the preservation and just distribution of the estate among the family. The power of testation will then be unrestricted because its character as an instrument of family protection will overshadow the danger of abuse. Again, the rules of intestate succession *ex hypothesi* will not be capable of serving as model for any restrictions of the freedom of testation. The complement of legislative reluctance to interfere with freedom of testation will be the popularity of wills with the public, a sentiment which may even acquire the intensity of a horror of intestacy, such as that generally attributed to the Romans. Maine has explained that this "passion for testacy was generated by some moral injustice entailed by the rules of intestate succession."[12] This injustice he found in that, under the *jus civile*, emancipated children had no share in the inheritance, "so that on failing to execute an operative testament, a Roman of the era under examination left his emancipated children absolutely without provision, while, on the assumption that he died childless, his possessions would escape from the family altogether, and devolve on a number of persons with whom he was merely connected by the sacerdotal fiction that assumed all members of the same *gens* to be descended from a common ancestor."[13] These rules caused "this vehement preference for the distribution of property under a testament over its distribution by law,"[14] and it is due to them "that a will never seems to have been regarded by the Romans as a means of *disinheriting* a family, or of effecting the unequal distribution of a patrimony," but that it was "chiefly valued for the assistance it gave in *making provision* for a family, and in dividing the inheritance more evenly and fairly than the law of intestate succession would have divided it."[15] The law of the Twelve Tables accordingly conceded the utmost liberty of testation, ignoring the danger of disinherison, "inasmuch as it did not legislate against a contingency which no Roman lawgiver of that era could have contemplated,"[16] although the improvement of the scheme of intestate succession through the intervention of the Prætor led eventually to the adoption of stringent limitations of testamentary freedom.

Having explained the ancient conception of the power of testation,

[12] *Op. cit.*, p. 247.
[13] *Op. cit.*, p. 246.
[14] *Op. cit.*, p. 244.
[15] *Op. cit.*, p. 243. Maine's account is confirmed by modern Romanists. See Jolowicz, *Historical Introduction to the Study of Roman Law*, pp. 123 ff, 256 ff; Schulz, *Principles of Roman Law*, p. 156.
[16] *Op. cit.*, p. 242.

Maine proceeds to contrast the modern "view of a will which regards it as conferring the power of diverting property from the family, or of distributing it in such uneven proportions as the fancy or good sense of the testator may dictate."[17] This change of character of the power of testation is attributed to the influence of primogeniture. "As the feudal law of land practically disinherited all the children in favour of one, the equal distribution even of those sorts of property which might have been equally divided ceased to be viewed as a duty," and wills became "the principal instruments employed in producing inequality."[18] This reasoning arrives from similar premises of the unsatisfactory nature of the rules of intestate succession under the *jus civile* and under feudal law at different conclusions as to the character of the power of testation under Roman and English law. Whereas the conflict between the law and the family led to improvement of the law in Rome, in England, family sentiment, so far from being able to compel a change of the law, is even alleged to have become corrupted through the law of intestate succession. These surprising results can be avoided by interpreting the course of development of the English law of succession as parallel in outline to that of Roman law.

There is indeed ample evidence that what Maine described as the modern view of the nature of a will has never applied to the power of testation in English law. As regards realty, the denial of the power of testation was certainly not inspired by the belief that the family was best provided for under the rules of intestate succession, but, as Holdsworth explained, "probably the decision to prohibit them (devises of land) was caused chiefly by the fact that to permit them would lower the value of the incidents of tenure, and enormously diminish the lord's chance of an escheat."[19] On the other hand, the popularity of the use was largely due to the fact that it enabled landowners to evade this prohibition of wills of land, and wills were desired in order to prevent the disinherison of the family under the rules of intestacy based upon the principle of primogeniture and in order to escape from the heavy burden of the feudal incidents which would have to be borne by the inheritance.[20] The Statute of Uses, 1536, provoked opposition "particularly because it abolished the powers of devise hitherto enjoyed by landowners."[21] The fact that this opposition could be allayed by the Statute of Wills, 1540, which restored a large measure of the power of devise, but ensured the enforcement of feudal incidents, confirms that freedom of testation was desired even more urgently than freedom from feudal taxation.[22] The absence of all restraints on the power of testation granted by the Statute of Wills may be explained, similar to Maine's explanation of the Twelve Tables, by the remoteness of the danger of abuse of this power. Subject to minor modifications, the rules of intestate succession to realty remained unchanged until 1925; no occasion arose, therefore, to revise the estimate of the power of testation.

In view of the paramount importance of land law during the Middle Ages, it is not surprising that even with regard to personalty the power of testation was considered to bear the character of an instrument protecting the family which had been impressed upon it by the rules of intestate

[17] *Op. cit.*, pp. 248–9.
[18] *Op. cit.*, p. 250.
[19] 3 *History of English Law*, at p. 75.
[20] Holdsworth, 4 *H.E.L.*, 438; 7 *H.E.L.* 372. See also Bigelow, "The Rise of the English Will," 3 Sel. *Essays in Anglo-American Legal History*, at p. 780.
[21] Plucknett, *op. cit.*, Chap. 7; Holdsworth, 4 *H.E.L.* 463.
[22] Holdsworth, 4 *H.E.L.* 465.

succession to realty. This preoccupation of the mediæval courts of common law with the law of real property may have contributed to the reluctance shown by them to recognise the limitation of the power of testation of chattels imposed under the ancient system of *legitim* described by Glanvill. The existence of this system of *legitim* was not due to suspicion of the power of testation. It did not spring from satisfaction with the rules of intestate succession and was not accompanied by reluctant exercise of the power of testation. On the contrary, "during the two centuries which followed the Norman Conquest an intense and holy horror of intestacy took possession of men's minds."[23] A deliberate refusal to make a testamentary disposition of movables did not only show contempt of the spiritual authority of the church, inasmuch as death intestate meant death unconfessed, it also prejudiced the material interests of the church which expected to benefit from substantial legacies for religious and charitable purposes, and finally, it left the family without all provision as intestacy led to forfeiture of the personal property of the intestate to the feudal lord. The church after a prolonged struggle succeeded in defeating the claims of the lords and to assume control of the administration of the property of intestates. The purpose of this administration was to remedy the failure to make a will and this led to the introduction into intestate succession of the same tripartite division of the estate by which the exercise of the power of testation had been controlled. The normal relation of the rules of intestate succession and restraints of the power of testation by which the former provide the model for the latter rules was, therefore, here reversed, and this makes it impossible to assert that the creation of the ancient system of *legitim* expressed satisfaction with the rules of intestate succession and distrust of the power of testation.

But even if the establishment of *legitim* did not indicate conflict between the power of testation and the family, did the removal of these restraints not operate against the interests of the family and thus reveal a change of attitude towards the family? To answer this question it is necessary to consider whether the system of *legitim* did, in fact, operate for the benefit of the family, and this depends upon the efficiency of the machinery through which it was enforced as well as upon the substance of the restraints. The system was operated through executors and administrators under the supervision of the ecclesiastical courts. Holdsworth points out that these courts, especially those of the southern province, in which the *legitim* first disappeared, "had never at any time been very efficient supervisors of the conduct of the administrator."[24] This became even worse when the common law courts began to interfere with the exercise of the jurisdiction of the ecclesiastical courts. The development, traced by Caillemer,[25] by which the executor's right to dispose of the dead man's part ultimately conferred upon him the character of residuary legatee,[26] was bound to prejudice the claims of the family. Moreover, the restraint imposed by the tripartite division of the estate may increasingly have been felt to consist less in defining the maximum that could be diverted from the family than in compelling disinherison of the family to the extent of the dead man's part. There is ample evidence that the

[23] 2 Pollock and Maitland 356.

[24] 8 *H.E.L.* 556.

[25] "The Executor in England and on the Continent," 3 Sel. *Essays in Anglo-American Legal History*, 746. See also Parry, *The Law of Succession*, at p. 131.

[26] This was abolished by the Executors Act, 1830, s. 1; now Administration of Estates Act, 1925, s. 49 (b).

church succeeded in its claim to the dead man's part in cases of intestate succession,[27] and also in cases of testamentary succession "it is very probable that this part, even in the absence of a formal clause in the will, was expected to be applied entirely for the good of the soul of the deceased."[28] The *legitim* operated, therefore, as a form of taxation by which the church raised funds for its own purposes and for the performance of the numerous public services rendered by it during the Middle Ages no less than for the protection of the family. The former aspect became more prominent as the authority of the church declined. It is certainly significant that the final disappearance of *legitim* in the southern province occurred at the time of the Reformation and of the transfer of social services to secular agencies.[29]

In view of the close connection between the system of *legitim* and the rules of intestate succession,[30] it was inevitable that the abandonment of the one was followed by the disappearance of the other. The confusion resulting from the lack of definite rules of intestate succession was ultimately remedied by the Statute of Distribution of 1670. The family now became entitled to claim the whole, and not merely two-thirds, of the estate of the intestate. The nature of this change, therefore, makes it difficult to read into the abandonment of the old scheme of succession any lack of concern for the interests of the family. But as the establishment of the old rules of intestate succession had been preceded by the system of *legitim*, the new rules were confined in application to those parts of the country in which the *legitim* had been abandoned.[31] In order to make the improved system of intestate succession available to the rest of the country it was necessary to abolish there the *legitim*.[32] This explanation of the series of statutes from 1692 to 1724 by which *legitim* was abolished meets, however, with the difficulty that the statutes themselves profess to have been passed for reasons different from those suggested here. On the other hand, it is not uncommon to find the legislature either unwilling to reveal the true reasons for a change of the law, or incapable of discerning the causes which have produced it. The reasons given are, moreover, not

[27] 2 P. & M. 356 ff. Gross, "The Mediæval Law of Intestacy," 3 Sel. *Essays in Anglo-American Legal History*, 723. He points out, however, that "the importance of personal property in boroughs, which was due to the predominance of mercantile over agricultural interests, would naturally make both the lords and the burgesses inclined eagerly to assert their claims against the pretensions of the prelates."

[28] Caillemer, *op. cit.*, at p. 764.

[29] Wedgwood, *op. cit.*, p. 112, discussing the size of philanthropic bequests in England and America (he calculates that in England these form about 6½ per cent of all estates over £1000; it is instructive to compare this figure with the proportion of the estate diverted from the family under the mediæval *legitim*), points out "that in America there is a much greater dependence on voluntary contributions, rather than on taxation, for the relief of poverty and for other social purposes." In England, however, "it has been obvious, at least since the days of the Tudors, that from the fiscal point of view, taxation is a more satisfactory expedient than exhortations to private beneficence."

[30] "That the two parts of the older scheme—the restriction on testation and the rules of intestate succession—hang together, is clear from the survivals." Holdsworth, 3 *H.E.L.* 554.

[31] 22 and 23 Car. II, c. 10, s. 4.

[32] Although the Statute of Distribution was not extended to the rest of the country until 1856, the essential benefit of the new scheme from the point of view of the family was secured by the Statute of Distribution, 1685, which provided that the rules of succession to the dead man's part should be the same as those which governed intestate succession to movable property under the Act of 1670.

incompatible with the explanation suggested above. The Act of 1692,[33] which abolished *legitim* in the northern province, proclaimed the intention to protect the interests of the younger children. The Act of 1724,[34] which abolished *legitim* in London, speaks of the desirability of removing restraints on the testamentary power which might discourage wealthy merchants from becoming members of the city. As the power of testation was not considered to be opposed to the family, this object of the Act was perfectly compatible with the unexpressed aim of enabling change of the law of intestate succession. The character of the power of testation resolves thus the apparent paradox that the improvement of the status of the family in the law of intestate succession was preceded by the removal of restraints on the power of testation.

Further proof of the manner in which the power of testation was regarded throughout the history of English law is provided by the ancient rule of the revocation of wills in consequence of subsequent marriage.[35] This rule obviously assumed and facilitated the exercise of the power of testation in performance of family obligations. Originally, the will of a man was only revoked by marriage and birth of issue whereas the will of a woman was revoked by marriage alone. This was explained by the provision made for the wife by the institution of dower. After the virtual abolition of dower by the Dower Act, 1833, the position of husbands was assimilated to that of wives by s. 18 of the Wills Act, 1837, thus confirming the continued belief of the beneficent effect of the power of testation from the point of view of the family. A similar inference would appear to be justified from the enactment of s. 177 (1) of the Law of Property Act, 1925, which provides an exception to the rule for wills expressed to be made in contemplation of marriage.

Finally, the origin of the modern system of intestate succession established under the Administration of Estates Act, 1925, may be cited in support of the contention that the power of testation was not regarded in English law as hostile to the family. The new rules of descent were based upon an investigation of a large number of wills conducted at Somerset House.[36] This attempt to ascertain the regulation of succession desired by the majority of testators and to base the rules of intestate succession on this model assumed that the power of testation is normally exercised in the interests of the family and that the changing requirements of the family would be expressed through this power. The change effected in 1925 consisted in the adoption of a uniform system of intestate succession which revealed the decline in the economic importance of realty and in the social importance of marriage settlements of land, as the feudal rules of descent of realty had been adapted to the needs of marriage settlements by the ingenuity of conveyancers. The change also consisted in improvement of the rules of succession, consisting, as regards realty, in the abolition of primogeniture, and as regards personalty, in modifications of the system enacted in the Statutes of Distribution which were required by changes in the structure of the family.

[33] 4 Will. and Mar., c. 2.

[34] 11 Geo. I, c. 18, ss. 17, 18.

[35] The history of this rule is discussed by Graunke and Beuscher, "The Doctrine of Implied Revocation of Wills by Reason of Change in Domestic Relations of the Testator," 5 *Wis. L. R.* 387; Durfee, "Revocation of Wills by Subsequent Change in the Condition or Circumstances of the Testator," 40 *Mich. L.R.* 406.

[36] 2 Wolstenholme and Cherry's *Conveyancing Statutes*, 1493; Parry, *op. cit.*, p. 136.

This improvement of the law of intestate succession reacted on the estimate of the power of testation so as to invest it with the character of a potential threat to the interests of the family. This development, therefore, is one of the factors accounting for the introduction of limitations on testamentary freedom by the Inheritance (Family Provision) Act, 1938. The Act thus demonstrates the consistency of legal policy towards the family, in the face of changes of the law of succession and of the nature of the power of testation. But even if, as with regard to the Statute of Distribution, it is not mere coincidence that changes in the law of intestate succession should be followed by changes concerning the power of testation, the development which resulted in the Inheritance Act cannot be traced to origins as definite and recent as the passing of the Administration of Estates Act, 1925.[37]

The improvement of the rules of intestate succession from the point of view of the family dates back to the Statute of Distribution. The impression created by the system established under this Act was rarely contradicted by experience of the old rules of descent to realty as land comprised on marriage settlements, which also date back to the end of the seventeenth century, was virtually removed from exercise of the power of testation and from the application of the law of succession. The observation that intestacy did not produce disastrous results for the family must have become part of the stock of social experience, yet s. 18 of the Wills Act of 1837 and the origins of s. 46 of Administration of Estates Act, 1925, show that the old preference for testamentary succession was still alive. The explanation of this contradiction may be expressed in the words of Maine: "Everybody conversant with the philosophy of opinion is aware that a sentiment by no means dies out, of necessity, with the passing away of the circumstances which produced it. It may long survive them; nay, it may afterwards attain to a pitch and climax of intensity which it never attained during their actual continuance."[38] The existence of conflicting impressions of the power of testation provides the climate of opinion in which the Inheritance Act was passed. It accounts for the apathy of the public, the protracted course of legislation[39] and the compromise character of the provisions of the Statute.

This timidity of the legislature prevented any striking effect of the Inheritance Act on the family. Definite conclusions can, moreover, not easily be formed in view of the small number of decisions which, against

[37] The legislative history of the Inheritance Act can, indeed, be traced as far back as 1908, when, at the suggestion of the King, the British ambassadors in various countries were instructed to report on the various systems of restraints on testamentary freedom.

[38] *Op. cit.*, p. 248.

[39] In 1931, Miss Rathbone introduced a Bill under which defined portions were given to the surviving spouse and children. This Bill was given a second reading and referred to a Joint Select Committee of both Houses. The Committee reported against the Bill, but in favour of allowing applications to the Court for support, measured by the size of the estate and the circumstances in which the family had been living. Acting on these recommendations, Sir John Wardlaw-Milne introduced another Bill in 1934, which, however, did not get beyond the report stage. In 1936, a similar Bill, introduced by Mr. Windsor, failed to become law as the session ended as soon as the Bill had passed through Committee. The same Bill, with only minor modifications, was again introduced by Mr. Holmes in 1937. It was passed and came into operation on 14th July, 1939.

For the pre-1931 history of the Act, see n. 37, *supra*, and Gold, *op. cit.*, at pp. 298, 301.

the expectations of the critics, have been given under it, and which are the only material for a study of the effect of the Act. Finally, the relation of the Act to the tendencies to be described is not strictly that of cause and effect. The Act rather confirms and adds its weight to developments which had begun before 1938 and which may have contributed to the passing of the Statute.

One of the most distinct developments is the emphasis on the rights of the widow as compared to those of the children. This tendency, of which there is already distinct evidence in the scheme of intestate succession established under the Administration of Estates Act, 1925, is shown in the Act by restricting the class of children entitled to claim provision under the Act, to infant sons, unmarried daughters, apart from children incapable of maintaining themselves by reason of some mental or physical disability.[40] The case of the widow rather than that of the children has been stressed by the sponsors of the Bill and, in fact, seven of the eleven decisions reported under the Act arose out of widows' applications. In four of these seven cases the claims of the widows conflicted with provisions made in favour of children. In *Re Lidington*[41] the testator had left the whole of his estate to his two infant sons, subject to a gift to a stranger of a life interest in one-quarter of the estate. On application by the widow, Farwell, J., directed that the income of two-thirds of the estate should be paid to her, she undertaking to maintain the two children during their infancy. The gift to the stranger was to remain intact. In the other three cases the applications of the widows failed. Although these results are explained by the circumstances of these cases and by the caution with which the powers conferred by the Act have been exercised by the Court,[42] there are in some of these judgments indications of a tendency to stress the claims of the children as against those of the widow. Thus, in *Re Brownbridge*,[43] where one of the sons of the testator was the sole beneficiary under the will, Bennett, J., stated that he paid particular attention to the fact that this son had assisted his father in business and had become partner in the father's business. In *Re Pugh*,[44] where the testator had left his farm valued at £5000 to an infant grandson and the remainder of his estate of the value of £1800 to the widow, who had been his third wife, Morton, J., pointed out that no contribution to the prosperity of the farm had been made by the widow, who had been married only for a short time to the testator, whereas the father of the grandson had worked on the farm.

[40] Adopted, but not illegitimate, children are within the Act. No provision is made for grandchildren. The 1931 Bill proposed portions for children up to the age of 23 and over that age if unable to support themselves.

[41] (1940), Ch. 927,

[42] After repeated protestations of the difficulty of administering that Act, see e.g. the judgment of Farwell, J., in *Re Joslin* (1941) 1 All. E.R. 302, this tendency finally led to the statement of Bennett, J., in *Re Brownbridge* (1942) 193 L.T. Jo. 185, that the Act did not throw on testators a duty to make provision for their dependants, and that their dispositions could only be interfered with if shown to be unreasonable. These remarks, which have been quoted with approval in all subsequent reported cases, tend to establish between the Court and the testator a relation similar to that, so familiar to legal technique, between the Court of Appeal and a Court of first instance. The Court will thus be precluded from acting on its own conception of reasonable provision in the circumstances, and judicial interference will be confined to the extreme, and, accordingly, rare cases of unreasonableness by the most indulgent standards.

[43] *Supra*, n. 42.

[44] (1943) Ch. 387.

These cases reflect a conception of the economic function of the family entirely different from that expressed in the Act. Where the family operates as a unit of production restraints on the power of testation are founded on the right to a share in the joint enterprise and are necessary in order to obtain the co-operation of the family and to prevent its economic disintegration. These restraints must be extensive and clearly defined, and children over age cannot be excluded from their operation. The fact that under the Inheritance Act these considerations can only operate occasionally as some of the almost infinite variety of factors which influence the exercise of judicial discretion[45] may be taken as an indication of the change of the economic function of the family in this country. The strength of the new conception of the family is illustrated by *Dillon* v. *Public Trustee of New Zealand*,[45a] a decision of the Privy Council under the New Zealand Family Protection Act, 1908. The testator, after the death of his first wife, had entered into an agreement with his children which provided that the children should work on the sheep and cattle farm of the testator, and that in return the farm should be left to them by will. At the age of 81 the testator married again. By his will he left his farm valued at £3875 to his children, as agreed, and the residue, equivalent to £1416, to his widow. Variation of the will was ordered by providing that the farm should be charged in favour of the widow with an annuity which would bring up her income from the estate to £150 per annum.

The change of the position of the family in the economic structure reduces family obligations to responsibility for maintenance of dependants, that is, those members of the family who, by reason of age, sex, or infirmity are unable to maintain themselves. That the moral duty to maintain dependants has been strengthened by the provision of legal obligations is connected with the growth of public responsibility for the welfare of the individual. The Act was thus conceived as an instance of social legislation,[46] the State being relieved of its responsibility to the extent to which it had been delegated to the family. This aspect of the Act is responsible for the special provision made in s. 1 (4) for estates not exceeding £2000.

The experience so far available suggests that the restriction of testamentary freedom is not a suitable instrument of social legislation. Although of the reported decisions under the Act five concerned estates under £2000, and only three estates well above this figure, the remainder dealing with estates between £2–3000 or of uncertain but probably even smaller value, applications for maintenance succeeded only in one case, *Re Lidington*, of an estate of uncertain value, and two cases of estates well above £2000. The danger of encouraging litigation over small estates and the impossibility of ordering adequate maintenance, even by way of capital payment, or even of worth-while contributions to maintenance fully justify this result. Moreover, in several cases the relation of the Act to social legislation has been exactly reverse to that described above. Thus, in *Re*

[45] Thus in *Re Styler* (1942), Ch. 387, Morton, J., considered *inter alia* the fact that the estate which the testatrix had left to the daughter of her first marriage was derived from her first husband.

[45a] (1941), 2 All E.R. 284.

[46] In his evidence before the Joint Select Committee which considered the 1931 Bill (see *supra*, n. 39), Mr. Cecil James Wray, a New Zealand lawyer, explaining the nature of the New Zealand Act upon which the Inheritance Act was modelled, stated that the New Zealand Courts consider whether there is danger of the dependants becoming charges on public funds, a question which was raised on the second reading of the New Zealand Act.

*Catmull*,[47] where the testator, who left an estate of about £600, made no provision for his wife beyond giving her a life interest in personal and household goods worth £15, Uthwatt, J., refused to order any maintenance on the ground that the widow was entitled to claim Widows' and Old Age pensions. In *Re Vrint*,[48] Bennett, J., refused to order maintenance for the widow out of an estate of £138, on the ground that the Act was not "for the purpose of obtaining legacies," and pointed out that the widow was entitled to claim pensions and to apply for Public Assistance. In *Re Brindle*,[49] the estate of a bank cashier was valued at £2700. The widow had a claim as a creditor against her husband's estate and owned a house mortgaged to a building society. In the will the absence of all provision for the widow was justified on the ground that she would have a pension from the bank of £116 a year, to which the testator had contributed. Bennett, J., found himself unable to say that the testator had not made reasonable provision for his widow.

Although the Inheritance Act stresses the dependence of wives as against that of children, no distinction is drawn between wives and husbands. Such discrimination has, however, been introduced by judicial interpretation for which three of the reported cases provided opportunity. In *Re Silvester*[50] the spouses had been married happily for twenty-six years. On marriage, the husband had given up his work as manager of a public-house in order to look after his wife and run the home, the expenses of which were paid out of the wife's substantial income. Under the wife's will the husband received an annuity of £1 per week, the bulk of the estate going to charities. Farwell, J., declared that application by widowers for maintenance under the Act should only be granted in exceptional circumstances as they could be expected to maintain themselves. He ordered, however, that the annuity of the widower should be increased to £3 per week. In *Re Pointer*[51] an application for maintenance was made by a retired schoolmaster, aged eighty-three, who had been separated from his wife for more than forty years, but had remained on good terms with her. The widow's estate was valued at £15,849. Morton, J., ordered that not more than five shillings per week should be paid to the husband as he had an independent income of £330 per annum. In *Re Styler*,[52] where an application by a widower for maintenance was refused, Morton, J., explained that he no longer approved of his own decision in *Re Pointer* as the widower in that case was able to maintain himself. It would seem, therefore, that the rights conferred on widowers by the Act are confined to the unusual situation of complete and unavoidable financial dependence on the income of the wife.

The fact that out of a total of eleven reported cases three concerned applications by widowers does not, of course, indicate an increase of the number of marriages in which husbands are financially dependent upon their wives, although it does show that the cases in which relief under the Act has been sought are not typical of the family. Of this abnormality there is abundant evidence. Thus in *Re Vrint*, *Re Lidington*, and *Re Brownbridge* the married life had been unhappy and the spouses had, in

[47] (1943), Ch. 262.
[48] (1940), Ch. 920.
[49] *The Times*, 22nd July, 1943.
[50] (1941), 1 Ch. 87.
[51] (1941), 1 Ch. 60.
[52] *Supra*, n. 45.

fact, lived in separation. In *Re White*[53] and *Re Joslin*,[54] moreover, adulterous unions had been formed. In *Re Vrint*, *Re Styler*, *Re Catmull*, and *Re Pugh* the marriage was the second or third of one or both spouses. The age of the spouses at the time of marriage was accordingly far above the normal age of marriage. The only decision, in fact, where not at least one or, as more usual, several such elements of deviation from normal and happy family life are disclosed is *Re Brindle*, of which only the very condensed report in *The Times* is available.

The small number of cases in which the Act—which by its very nature and the vagueness of the jurisdiction it creates seems to invite litigation—has been invoked[55] in the period of more than four years during which it has been in operation is material when considering whether the Act has revealed any signs of disintegration of family life. If complaints of the exercise of the power of testation can be interpreted as indications of decline in the sense of obligation and responsibility towards the family, then the small number of such complaints and the even smaller number of cases in which these complaints were found to be justified are indeed significant. It appears to be still more significant that these complaints are confined to circumstances which are clearly distinguished from those of normal and happy family life. When considering the decisions under the Inheritance Act from this point of view it is also important to bear in mind that the majority of the testamentary dispositions complained of did not divert the estate entirely from the family. This only happened in *Re Vrint*. In *Re Silvester* the testatrix left small annuities to her sister and to her brother-in-law in addition to the small annuity given to her husband, but the residue of her considerable estate was left for charitable purposes. In *Re Joslin* the beneficiaries under the contested will were the illegitimate children of the testator and the mother of these children. The provisions of the will in *Re White* were probably of similar character, although this does not appear clearly from the reported facts. As in all the other cases, the contested dispositions were in favour of members of the testator's family, of whom in *Re Lidington* all and in *Re Catmull* some fell even within the narrow definition of dependants under the Act, there is even less evidence of irresponsible and capricious exercise of the power of testation. These dispositions rather seem to bear the marks of the complexity of the social situation and of the moral dilemma with which the testator was confronted.

Although the decisions reported under the Inheritance Act do not, therefore, show any decline of family obligations, they do convey a hint of uncertainty of direction, which may be attributed to the influence of changes of character and function to which the family, no less than other social institutions, is subjected. This sense of uncertainty of direction was perhaps best expressed in the course of the House of Commons debate on the second reading of the Bill by quoting Chesterton's remark, "that

[53] (1941), 1 All E.R. 236.
[54] (1941), 1 All E.R. 302.
[55] To estimate the proportion of reported cases to the total number of applications brought under the Act, it must be remembered that under O.54 F, R.S.C., applications under the Act, which are to begin by Originating Summons, may be adjourned into Chambers if it appears desirable that they should not be heard in open Court. To the list of reported cases should be added a reference to an application by a daughter reported briefly in the *Evening Standard* of 17th December, 1942. The applicant was married and divorced, but incapacitated as the result of an accident. She recovered under the will of her father an annuity of £300, which Farwell, J., increased to £500.

we do not know what is wrong, because we do not know what is right." It is perhaps possible to attribute to this sense of uncertainty some share in the decision to omit from the Act a list enumerating those violations of the sense of family obligation which would justify disinherison[56] but to allow instead to the Court a discretion, exceeding the limits of the ordinary law of evidence,[57] to consider the testator's reasons for making the dispositions contained in his will. *Re Joslin*, one of the most remarkable decisions given under the Act, provides a striking instance of such moral dilemma. The parties in this case were married in 1915. The only child of the marriage died soon. In 1934, the husband went to live with another woman who had two children with him. In 1937, a separation agreement was entered into under which the wife became entitled to maintenance of £1 per week. The husband's will left the whole of his estate of the value of £370 to the woman with whom he had been living for life and then to the two children.[58] The woman was destitute and in receipt of public assistance. The wife had a small income of her own. The refusal of Farwell, J., to order any variation of the will in these circumstances shows the direction of the change which the legal policy towards the family is undergoing towards recognition of the moral claims of a home as against those of a family relationship deprived of all but its formal meaning.[59]

J. UNGER.

[56] For the position under earlier Continental legislation, see Kahn-Freund in 1 MOD. L. REV. 305.

[57] The doubts arising under this provision to which attention was drawn in 3 MOD. L. REV. 53, were resolved in *Re Vrint*. See the comments in L.Q.R. (April, 1941) on p. 442. On the interpretation of this provision see also *Re Pugh*, *supra*.

[58] Although the provisions of the will contested in *Re White* (*supra*) were probably of similar nature, the issue raised was of different character. The testatrix, shortly after her marriage, separated from her husband. The daughter of the marriage was left to the care of a stranger, who received 15 shillings per week towards the child's maintenance. After five years these payments stopped. Later on the testatrix invited the daughter to live with her when she herself was living with a man. The daughter refused. The daughter suffered from serious, but not total, disability. The will disposed of the estate, the value of which was not stated, to a stranger for life and then to a sister of the testatrix. Farwell, J., refused to order any maintenance for the daughter on the ground that the mother was not domiciled in England (this part of the decision is considered in 5 MOD. L. REV. 66), and on the ground that the mother's dispositions did not disappoint any expectations based on her previous conduct. The decision seems harsh, as no blame seems attributable to the daughter or foster-mother for the absence of normal relations between mother and daughter.

[59] Cf. *Andrews* v. *Andrews* (1940), P. 184, and comment thereon in 4 MOD. L. REV. 307.

# STATUTES

## The Finance Act, 1943

This Act is mainly confined to rounding off administrative difficulties and inequities experienced in the working of the Income and Excess Profits Tax provisions of earlier Finance Acts; there were, as usual, increases in indirect taxation. The conditions for obtaining Income Tax allowances for housekeepers and dependent relatives were made easier, while Section 20 of the Act removed doubts that had been expressed by the Court in *Lord Herbert* v. *Inland Revenue* (1943), 1 All E.R. 336. Section 20 of the 1922 Finance Act, Section 21 of the 1936 Act, and Part IV of the 1938 Act form a code wherewith to avoid the effect of legal evasion of tax by means of settlements and dispositions. In *Herbert's case*—actually decided on another point—the view was expressed that this code did not apply to settlements where there was more than one settlor; Section 20 of this year's Act together with the Sixth Schedule establish that the earlier legislation referred to above has always applied to cases of joint settlors and enact, in brief, that each settlor is to be dealt with as though he were the only settlor and only as regards property or income originating from him.

The Excess Profits Tax provisions give further relief to concerns with wasting assets, but their main interest lies in Section 23 aimed mainly at the "whisky ramp" of which so much was made in the lay Press; briefly this was effected by control of a company being obtained and its stock sold at pre-war prices to a speculator who resold at full war-time values, often paying large sums as commission, in such a way that none of the persons concerned in, or benefiting from, the transactions became liable to the tax. The Section, in short, gives power to the Inland Revenue to charge the full Excess Profits Tax that would have been due if the trading stock had been sold by the company in the first instance for the full market value; further power is given to charge, jointly and severally, all the persons who have financially benefited from the scheme. Professional men, i.e. barristers, solicitors or accountants, who have assisted in such schemes are specifically exempted from the provisions of the section if they have only charged the customary (*sic*) rate in the profession for the services rendered by them; strong objection was rightly raised in Parliament to the relief thus given to the very persons without whose help these "evasion" schemes could not be effected.

The remaining provisions of the Act are not of general interest, though it is worth noting that penalties are imposed for false returns for Excess Profits Tax, and that the penalties in regard to offences in relation to Customs and Excise and the Purchase Tax are increased, including the right to impose both a monetary penalty and imprisonment.

A. FARNSWORTH.

# NOTES OF CASES

## Divorce Law Reform by Judicial Legislation

The House of Lords has added another important piece of judicial legislation to the series of decisions by which, in recent years, it successfully attempted to fill gaps in the law and to remove the evil effect of antiquated doctrines which are no longer compatible with modern developments.

The case of *Blunt* v. *Blunt*, (1943) 2 All E.R. 76, is remarkable from three different points of view: it will deserve more than a passing reference in future discussions of the principle of precedent, it makes a contribution to the doctrine of judicial discretion, and, above all, it introduces what may turn out to be a reform in certain aspects of divorce law.

(1) In his essay on "Determining the *Ratio Decidendi* of a Case" (Chapter I of *Essays in Jurisprudence and the Common Law*), Professor Goodhart points out that the "principle of a case" is not to be found in the reasons given in the opinion or in the rule of law set forth in the opinion, but in the selection of relevant facts by the judge in conjunction with the decision itself. Hence, if in an appeal court all the judges arrive at the same conclusion, but each regards different facts as relevant, the value of the decision as a precedent is cut down to the lowest common denominator of all the judgments. In other words: The case will only serve as a precedent in a situation in which *all* the facts are present which any one of the judges in the previous case regarded as material. If this doctrine is sound—and it is difficult to see how its validity can be refuted—the habit of publishing a number of concurring opinions works, or is capable of working, as a serious limitation on the value of appeal decisions as precedents. Students of the Law of Torts need hardly be reminded of *Sorrell* v. *Smith*, (1925) A.C. 700, students of Private International Law will not easily forget their intellectual struggles with *Republica de Guatemala* v. *Nuñez*, (1927) 1 K.B. 669. In recent years the House of Lords has more and more frequently resorted to the practice of publishing only one opinion with which the other learned Lords "concurred" or "agreed," while in the Court of Appeal the publication of a "judgment of the Court" has become increasingly common. In the case under review the House intimated, at the conclusion of the oral arguments, its unanimous view that the appeal should be allowed, and reserved to a later day the statement of its reasons. The reasons were stated in one speech by the Lord Chancellor, who said that he had had "the great advantage of the co-operation of the other members of the House in preparing this opinion," and that he understood that they concurred in it.

This, then, is the nearest approach to the "judgment of the Court" in the Court of Appeal, and to the practice of the Privy Council, of which the House, according to its constitution, is capable. It is a concession to the certainty of the law at the expense of an increasing amount of "anonymity" in the process of judicial law-making. If the idea of the judge-legislator, the principle of *stare decisi*, is to be maintained in the growing complexities of our legal world, it is difficult to see how the publication of concurrent opinions by various judges can be continued. The decision under review serves as an indication of what is, in all probability, the trend of the future.

The facts of the case can be stated very briefly. Both spouses were guilty of adultery. The husband petitioned for divorce, the wife cross-

petitioned. Hodson, J., dismissed the cross-petition, exercised his discretion in favour of the husband, and granted him a decree *nisi*. On the wife's appeal the Court of Appeal found that Hodson, J., had wrongly exercised his discretion, dismissed the husband's petition, and rescinded the decree *nisi*, but affirmed the dismissal of the wife's cross-petition. On the husband's further appeal the House of Lords held that the Court of Appeal had wrongly interfered with the judge's discretion, and restored the decree *nisi*, while refusing to act on the cross-petition.

The "principle" of the case—within the meaning of Professor Goodhart's analysis—is purely and simply the selection of the facts which justify an interference by the Court of Appeal with the exercise of a judge's discretion in a certain type of divorce case. But the importance of the decision far transcends its value as a precedent in the technical sense. Its real significance lies emphatically not in what the House did, but in what it said. It claims the attention of the legal profession precisely for what Professor Goodhart rightly considers to be outside the province of the judge as a law-maker, "the rule of law set forth in the opinion," or, to be more exact, the policy enunciated and recommended in it. It is one of those cases, increasing in number, which make one wonder whether the time has not arrived for the formulation of a theory of judicial policy-making alongside the doctrine of precedent which it would not supersede but supplement. The House refused to dissolve the marriage on *both* petitions, but the value of its decision lies in the "dicta" on the dissolution of a marriage on the basis that both spouses are at fault. The "mere" *obiter dictum* far outweighs the *ratio decidendi*. In the light of a case of this kind Professor Oliphant's "Return to *Stare Decisis*," and the American "realistic" approach to judicial decisions look curiously unrealistic. Clearly, the policy-making significance of the dictum is largely bound up with the suppression of "concurrent opinions."

(2) The *ratio decidendi* is not without considerable interest. Only three times since the Matrimonial Causes Act, 1857, had a higher Court been faced with an appeal against the exercise of the judicial discretion to refuse or to grant the dissolution of a marriage upon the petition of a spouse who was himself guilty of a matrimonial offence. In each of these cases the appeal was dismissed by the Court of Appeal and in none of them was there a further appeal. The House of Lords thus got a first opportunity of deciding in what circumstances an interference by a higher Court with a discretionary decision of this kind was permissible. An appeal can only succeed, "if it can be shown that the Court acted under a misapprehension of fact in that it either gave weight to irrelevant or unproved matter or omitted to take into account matters that are relevant." These words have a familiar ring. Similar principles have been laid down before in other cases where the province of "discretion" was to be defined, and of which *Evans* v. *Bartlam*, (1937) 2 All E.R. 346, is as good an example as any. The interesting novel point in the instant case is the distinction drawn between cases like *Osenton & Co.* v. *Johnston*, (1942) A.C. 130, where the material for forming a conclusion is entirely documentary and "thus equally available to the appellate court," and a case like the present, where "the proper exercise of the discretion . . . largely depends on the observation of witnesses." The case for "non-intervention" is far stronger in a situation of the latter type.

(3) The House refused to interfere with the discretion of the judge. Yet it laid down a number of rules of guidance for the exercise of the

discretion in future cases. It formulated a policy, and, in doing so, pronounced two principles the importance of which it is difficult to exaggerate.

(*a*) It had been said in the past that four considerations should be present to the mind of a judge who is requested to exercise his discretion in divorce cases: (i) the position and interest of any children of the marriage; (ii) the interest of the party with whom the petitioner was guilty of misconduct, particularly the prospect of their future marriage; (iii) the prospect of reconciliation between the spouses; (iv) the interest of the petitioner, especially with reference to re-marriage. To these four points the House now added a fifth, "which must indeed be regarded as of primary importance, viz. the interest of the community at large, to be judged by maintaining a true balance between respect for the binding sanctity of marriage and the social considerations which make it *contrary to public policy to insist on the maintenance of a union which has utterly broken down.*" (Italics ours.) The Lord Chancellor went on to say that "in recent years this last consideration has operated to induce the court to exercise a favourable discretion in many cases where in earlier time a decree would certainly have been refused."

That matrimonial law is dominated by a paramount public interest, is a principle of great antiquity. However, in the past, that public policy was only capable of operating *in favorem matrimonii*. The law of contracts and the law of property abound with decisions which invalidated an agreement or a settlement on the ground that it either interfered with the freedom of marriage or tended to loosen the *vinculum matrimonii*. That public policy in relation to matrimonial matters is flexible was clearly demonstrated by Lord Atkin and Lord Wright in *Fender* v. *Mildmay*, (1937) 3 All E.R. 402. Public opinion has long since recognised that there may be a public interest in the non-existence or in the discontinuance of a marriage as well. *Andrews* v. *Andrews*, (1940) P. 184 (see Note in 4 M.L.R. 307 by Mr. Unger), shows how the law is beginning to adapt itself to this opinion, and the case under review is a further important step in this direction. In their own way the Courts are continuing the work which Parliament had begun when it enacted the Matrimonial Causes Act, 1937. Indeed, the Courts have perhaps been more enlightened than the legislature, for the negative decision to leave intact the institution of the King's Proctor was evidence of a one-sided view of the "public interest" in matrimonial matters of which the House of Lords, after the present decision, can certainly not be accused.

(*b*) When discussing the Matrimonial Causes Act, 1937, in this Review in December, 1937 (4 M.L.R. 231), the present writer pointed out that every system of divorce law was faced with two problems: that of the "general clause," and that of the choice between the doctrine of fault and the doctrine of misfortune. English law knows no "general clause" in divorce law. Wide though the discretion of the judge may be in judging the merits of the petitioner's case, he cannot pronounce a decree unless the facts can be pinned down to some specific type of conduct on the part of the respondent unless it is a case of insanity. On the other hand, the "fault" doctrine still governs the law. The conduct must be an "offence," the marriage must have been ruined through the fault of the respondent, otherwise there can be no divorce. The case under review does not, and cannot, of course, touch these foundations of English divorce law. Yet, it goes some way towards mitigating some of the consequences of these

doctrines. The Lord Chancellor enumerated the four alternatives which are open to a divorce judge where there are petition and cross-petition based on adultery: the Court can exercise its discretion in favour of the husband, in favour of the wife, in favour of neither, or *in favour of both*. The practice to pronounce a decree in favour of both parties has so far "been almost unknown in connection with cross charges of adultery." The House of Lords, however, draws the attention of the legal profession to the possibility "that cases may not infrequently arise in which each party, while proving the case for his or her petition, has been guilty of such conduct as by the terms of the statute entitles the court to dismiss the petition, where injustice may be done if discretion is exercised in favour of one of the parties only." Both sides are "in mercy" in a case like this. And there is no reason why the judge should not exercise his discretion in favour of both parties, and pronounce a decree without drawing a distinction between the parties. In doing so, the judge still acts on the "fault" doctrine, but it is a modified and purified doctrine. It is inspired by the idea that, possibly, "the blame for the breakdown of the marriage must be equally shared," and that nevertheless the judge may decide "that it is his duty . . . to bring the marriage to an end." The prejudice that the failure of a marriage must always be attributable to one spouse's fault has thus been partly thrown overboard. At the same time the wide powers of weighing the circumstances and the merits of the case of either side give the judge a position, at least where there are mutual allegations of adultery, which is beginning to resemble that obtaining under a regime of a general clause.

In his note in 1937, the present writer pointed out that the Matrimonial Causes Act, 1937, failed to introduce into English law the judicial power to apportion the blame for the failure of a marriage between the spouses and to dissolve the marriage on the ground that both parties are at fault. It appears now that this was not entirely correct. Where there are mutual allegations of adultery and *where both husband and wife desire a dissolution*, such a power exists, and has apparently existed ever since the Act of 1857. This power has lain dormant so far, and the House of Lords has called it to light. In doing so it did not act as a court, but as a group of legal experts of high standing and authority. But a similar dictum in a book, or an article, would have attracted little attention. *Auctoritas non veritas facit legem.*

The "observations" of the House on the dissolution of a marriage for mutual fault have no legal force, they are neither statute nor judge-made law. They "bind" nobody, they are not instructions. Yet, who can doubt that this is precisely the way in which "law" is made in this country?

O. KAHN-FREUND.

## Limitation of Actions - Suspension of Time "Same Hand to Pay and to Receive"

The decision of the Court of Appeal in *Trustee in Bankruptcy* of *Boering-Hanbury* v. *Boering-Hanbury*, [1943] 1 All E.R. 48, purports to be an application of the general rule that "if there are competent parties when the cause of action accrues, so that the Statute [of Limitation] begins to run, it then continues running notwithstanding any subsequent impediment to bringing an action. The statute once started suffers no

check" (Lightwood, *Time Limit on Actions* (1909), 207). Before coming to the facts of the case, a word may be said as to this rule. In some cases it is capable of working hardship. For instance, in *Rhodes* v. *Smethurst* (1838), 4 M. & W. 42, a debt was contracted in 1829 by a person who died in 1830. Protracted litigation ensued over his will, and his executor was not appointed till 1835, by which time the period of six years from the date of the cause of action had already elapsed. It was held that the debt was statute-barred. Thus the creditor, through his indulgence to the debtor for one year, without any fault of his own lost the debt. The reasons advanced for this rule in *Rhodes* v. *Smethurst* were: (1) that the statute did not provide for such cases; (2) that there was no precedent for allowing a suspension of time; and (3) that an opposite rule would occasion great inconvenience—"for it would be very difficult, in almost every case, to ascertain whether the statute had or had not run, and we should be obliged to take a great many documents and statements, a great many beginnings and endings, and should have to add up those precise periods of time, out of which the six years would have to be made out" (Alderson, B.). The third reason appears to be little more than a judicial objection to being asked to do simple addition; and it is a great exaggeration to say that the inconvenience would arise "in almost every case." The first two reasons were perhaps good enough for a judicial decision, but they will not explain how the Limitation Act of 1939 came to leave the rule alone. The explanation for this must be sought in the Report of the Law Revision Committee (Cmd. 5334 of 1936, pp. 20–1), from which it appears that the Committee considered the rule and positively approved it. The Committee recognised that the rule might impose hardship upon plaintiffs in certain cases, but asserted that a contrary rule "would in some instances impose grave hardship on defendants." No illustration was suggested of this grave hardship.

The decision in the *Bowring-Hanbury* case can, however, be justified without reference to the above rule. The facts, partially stated, were that a creditor became executor to his debtor; and it was held that time continued to run notwithstanding that the hand to pay and the hand to receive were the same. The justification for this (though it is a justification that is not clearly stated in judgments) lies in the executor's right of retainer. Assuming that the courts are prepared to suspend the operation of the Statutes (now the Statute) of Limitation (which normally they are not), they would be justified in doing so only for so long as the creditor is unable to obtain a judgment or satisfaction. Now it is true that a creditor-executor cannot obtain a judgment, for he cannot bring an action against himself, but he can normally[1] obtain satisfaction by virtue of his right of retainer. It was precisely because he could not bring an action against himself that the creditor-executor's right of retainer was developed; and if he does not exercise this right there is no reason why time should not run against him.

Even though the claim is being advanced by the trustee in bankruptcy of the creditor-executor, as happened in the instant case, there is no

[1] The exceptions appear to be unimportant in the present context. The only one worth noting is that there is apparently no right of retainer if damages are wholly at large, as frequently in tort: see *Loane* v. *Casey* (1775), 2 Wm. Bl. 965; *Re Compton, Norton* v. *Compton* (1885), 30 Ch.D. 15. If this be the law it is difficult to see what remedy the personal representative has in such cases; and if he has no remedy no problem as to the Statute of Limitation arises.

reason why the principle should be changed. If a bankrupt has allowed a debt owed to him to become statute-barred, his trustee in bankruptcy cannot profit by that debt, and it makes no difference whether the debt became statute-barred because the bankrupt omitted to obtain a judgment or because (being an executor) he omitted to exercise a right of retainer.[2] The only peculiarity in the case of retainer is that a non-bankrupt executor can retain a statute-barred debt, whereas, according to the decision of Channell, J., in *Wilson* v. *Wilson*, [1911] 1 K.B. 327, a bankrupt executor cannot retain any debt at all because the hand to pay and the hand to receive are not the same. It thus makes all the difference whether a bankrupt executor exercised his right of retainer in respect of the statute-barred debt before his bankruptcy or not. It may be noted that although the decision in *Wilson* v. *Wilson* was in no-way before the court in the *Bowring-Hanbury* case, the court left open the possibility of considering it should the point be raised in the future.

All the above applies equally to an administrator, who has the same right of retainer as an executor.

The position is quite different where it is the debtor who becomes executor or administrator to his creditor. Here there is no incentive for him to pay his debt, and there would be every incentive for him to allow it to become statute-barred if that were a legal possibility. To meet this, it was held by Lord Chelmsford in *Seagram* v. *Knight* (1867), 2 Ch. App. 628, that where a debtor becomes *administrator* to his creditor the operation of the statute is suspended. Where the debtor becomes *executor* to his creditor a somewhat similar result is reached but by a different route. In such a case equity treats the debt as having been paid at the moment of the creditor's death, so that the executor is charged with the debt as assets (*Ingle* v. *Richards* (No. 2) (1860), 28 Beav. 366). Incidentally, this seems to be much the more convenient rule, and it might with advantage be extended to the case of the debtor-administrator.

In the *Bowring-Hanbury* case Lord Clauson, delivering the judgment of the court, said of Lord Chelmsford's decision: "Whether his Lordship's view on this point would be held to be correct in a court not bound by his decision, it would not be pertinent for us, sitting in a court bound by his decision, to consider." If this formula implies any doubt as to *Seagram* v. *Knight* it is submitted that the doubt is unfounded. Apparently the objection, if any, to *Seagram* v. *Knight* is that it is opposed to the rule that the operation of the Statute of Limitation cannot be suspended. If it is opposed to this rule, does not the rule itself need reconsideration?

G. L. W.

## Statutory Duties and Contributory Negligence of Pedestrians Interpretation of Statutory Regulations

To discuss in detail the facts and judgments of the Court of Appeal in *Sparks* v. *Edward Ash, Ltd.* (1943), 1 A.E.R. 1, would be acting against the spirit of the observations of Goddard, L.J., and, in particular, of

[2] Peculiarly enough, even though the debt has become statute-barred, the creditor-executor who becomes bankrupt may if he chooses pay it to his trustee in bankruptcy (*per* Channell, J., in *Wilson* v. *Wilson*, [1911] 1 K.B. at 331), just as he may pay any other statute-barred debt (*Stahlschmidt* v. *Lett* (1853) 1 Sm. & Giff. 415). Apparently therefore the litigation in the *Bowring-Hanbury* case sprang from the refusal of the bankrupt to exercise this power.

MacKinnon, L.J. Both learned Lord Justices protested against the use of judgments concerned with questions of fact as rulings on points of law, and, by implication, against the reporting of such judgments. It is certainly true that, if the precedent system is to maintain itself even within the restricted and shrinking sphere left to it by the steady growth of statute law, it will have to be severely rationalised. The growing practice —noted elsewhere in this number—of one judgment only being delivered on behalf of the whole Court, is one step in this direction. Much more remains to be done in the way of confining law reporting to cases which lay down principles of law, and of limiting the reporting of such cases to the essentials.

In the words of MacKinnon, L.J., the present decision of the Court of Appeal "lays down one rule of law, and one only, namely, that, when a plaintiff claims damages for injury caused to him by the defendant's breach of a statutory regulation, the defence of contributory negligence, that is, that the effective cause of the plaintiff's injury was his own negligence, is available to the defendant." The decision thus applies to the thorny problem of pedestrians *versus* motorists on pedestrian crossings the principle, approved by the House of Lords in *Caswell* v. *Powell Duffryn Co.* (1940), A.C. 152, that the defence of contributory negligence is available in all actions for a breach of a statutory duty. This conclusion would seem obvious, but for the view of the trial judge in the present case that the decision of the Court of Appeal in *Bailey* v. *Geddes* (1938), 1 K.B. 156 (cf. the Note in 2 M.L.R. 239), bound him to decide otherwise. All the judgments in the Court of Appeal agreed that this was not the rule laid down in *Bailey* v. *Geddes*, despite certain *obiter dicta* that might suggest the contrary, and in any case the decision of the House of Lords in Caswell's case now makes it clear that the defence is available in all cases of breach of statutory duty. The Court rightly rejected any attempt to differentiate between one class of statutory duty and another for this purpose. Consequently the majority of the Court decided that the case should be sent back for a new trial to hear evidence on the question of contributory negligence. Scott, L.J., while agreeing on the point of law, saw no need for a new trial, as the facts, in his opinion, were sufficient to exclude contributory negligence on the part of the pedestrian. This view the learned Lord Justice based, in a judgment full of juristic and sociological interest, on the object and policy of the relevant Traffic Regulations. Lord Justice Scott has always been a vigorous opponent of a purely technical and logistic interpretation of statutes, and an exponent of statutory interpretation in accordance with the social objects of the statute. (Cf., among others, his observations in *The Eurymedon* (1937), p. 167, and *Re Capon* (1940), Ch. 442; cf. 4 M.L.R. 61.)

His judgment in the present case is another illustration of this welcome and timely return to the principles of Heydon's case. It is essentially based on two considerations: first, that the Pedestrian Crossing Places (Traffic) Regulations, 1935, were dominated by the need to give the pedestrian some protection against the terrible toll of pedestrian life and limb, and that therefore "the pedestrian who rightly shuns the risks of the open street between crossings and seeks the protection of his sheltered area, must surely be absolved in some degree from the insistent duty of care which he owes to motor traffic elsewhere"; second, that the Regulations were framed in the light of the Common Law doctrine, universally acknowledged to be harsh, cruel and unjust, that even the slightest degree of contributory

negligence on the part of the plaintiff precludes him from recovering anything. "It would, therefore, not be an unreasonable exercise of discretion by the Minister of Transport if he gave his pedestrian plaintiffs some help on the issue of contributory negligence." "These considerations are relevant in interpreting any doubtful language in the regulations for the purpose of ascertaining their bearing on the duty of the pedestrian."

Many contributions in this Review have combated the fallacy of a rigid and artificial isolation of legal technique from the social realities of which the law forms a part. Such isolation results often enough not in the exclusion of non-technical arguments, but in their relegation from the light of open discussion to the darkness of subconscious or semi-conscious inclinations and prejudices. It is certainly to be welcomed that a distinguished judge, with wide legal as well as political experience, should lend the weight of his authority to an approach in which the technical legal argument is supplemented by a teleological interpretation. This is, essentially, nothing but a return to the principles of Heydon's case which judges in subsequent centuries have largely abandoned, in substance though not in name.

W. FRIEDMANN.

## The Manchester Regiment Chain of Causation Alternative Danger

The *Oropesa* (1943), 1 A.E.R. 211, gives a good and straightforward illustration of the doctrine of alternative danger, well known to students of the Law of Tort. A collision occurred, in a mid-Atlantic gale, between the *Oropesa* and the *Manchester Regiment* which was so seriously damaged that the captain ordered the majority of the crew to take to the lifeboats, while he himself, with fourteen of the remaining members of the crew, decided to go on board the *Oropesa*, to arrange for salvage and any other help that might be possible. The lifeboat in which they went capsized, and some of its crew were drowned. The personal representatives and dependants of one of the seamen who had perished sued the owners of the *Oropesa* for damages because of negligent navigation and breach of duty. The owners contended that the chain of causation had been broken by the captain of the *Manchester Regiment* ordering the men to take to the lifeboats. Lord Wright, in a judgment with which the other members of the Court of Appeal agreed, had no difficulty in finding that this defence failed. ". . . I think that the vessel itself was in the grip of the casualty, or that the hand of the casualty lay heavily upon her; and that the conduct of Capt. Raper (the captain of the damaged ship) and Lord (the deceased) was directly caused by and directly flowed from it."

The decision is thus in the line of the leading decisions of the House of Lords in S.S. *Singleton Abbey* v. S.S. *Paludina* (1927), A.C. 16, and the *Metagama* (1927), 29 Lloyd L.R. 253. From these decisions, coupled with the earlier case of the *City of Lincoln* (1889), 15 P.D. 15, and the later case of *Summers* v. *Salford Corpn.* (1943), 1 A.E.R. 68, Lord Wright derived the principle that, "if the plaintiffs do whatever they do reasonably, though unsuccessfully, then their mistaken judgment may be a natural consequence for which the offending ship can be responsible."

Perhaps authors of textbooks on the Law of Tort might be induced to reduce the length of the chapter on causation by Lord Wright's view that the many, "somewhat august phrases" which are current in the

treatment of causation problems, "only mean that there was not such a direct relationship between the act of negligence and the injury that the one could be treated as flowing directly from the other." All the numerous formulas and metaphors, whether in Latin or in English, do not alter the fact that whether causation is interrupted is essentially a matter of fact and common sense. Lord Wright added, however, yet another term when he formulated the general principle as follows: "It must always be shown that there is something which I will call ultroneous, something unwarrantable, a new cause coming in disturbing the sequence of events, something that can be described as either unreasonable or extraneous or extrinsic."

W. FRIEDMANN.

## Conveyancers' Cases

Here are some cases of interest for the conveyancer. A learned reviewer in the *Law Journal* (93 L.J. 183) aptly observed "what a vast field is included in the word 'conveyancing'," and every conveyancer is made aware of the solid fact that reports bearing upon his sphere of the law may be often found in the most unlikely quarters. Of course, "stamps" are within his normal range of vision, although many cases on stamps are outside the horizon of conveyancing. *G.H.R. Co.* v. *Commissioners of Inland Revenue*, [1943] 1 All E.R. 424, is actually a conveyancer's case, but its interest lies beyond its stamping decision. Shortly, the case confirmed the generally adopted view that an assent giving effect to a sale is chargeable with *ad valorem* duty as a conveyance on sale. The case by its reference back to *Kemp* v. *Commissioners of Inland Revenue*, [1905] 1 K.B. 581, shows the change in the visualisation of the nature and operative effect of assents since the New Property Legislation of 1925 has come into action. In that case, quoting Macnaghten, J., in the present case at p. 425, Phillimore, J., held "that the assent by an executor to a devise of real estate under the Land Transfer Act, 1897, s. 3, is merely evidence that he has no longer any claim upon the property and that it does not operate to vest it in a devisee." In his opinion the property became vested in the devisee by the will of the testatrix. In the present case, however, the freehold properties to which the assent relates became vested in the appellant by the assent, and not by the will, and therefore, the reason given by Phillimore, J., for his decision in Kemp's Case (*supra*) is inapplicable. The case should be pondered over carefully, as it contains reasoning which illuminates the wording of both s. 54 of the Stamp Act, 1891, and s. 36 (11) of the A.E.A., 1925. The change from the standpoint of Kemp's Case (*supra*) was clearly shown in the first post-1925 edition of "Wolstenholme," where the learned editors of Wolstenholme and Cherry, *Conveyancing Statutes* (eleventh edition), observe in their note to the A.E.A., 1925, s. 36 (2) (at p. 533): "This sub-s. makes the assent into the act in law by which the estate or interest is vested in the person named. Before 1926 the operation of an assent (which then would only be made by an executor) was to make the dispositions of the will operative. The vesting in the beneficiary took effect not by the mere force of the assent of the executor, but by virtue of the disposition in the will which became operative because of the assent: *Attenborough* v. *Solomon*, [1913] A.C. 76, 82." The old position is clearly put in Robbins and Maw, *Devolution of Real Estate and Administration of Assets* (third edition, 1901, p. 341), where it is observed that "an assent merely perfects and does not create

the interest of the legatee or devisee." The essence of the New Property Legislation in this behalf is to be found in the contemplation of the assent as an instrument of *Conveyance*. As observed in Wolstenholme and Cherry (*ibid.*), "Under this sub-s., the assent becomes a new form of conveyance; it is excepted from the requirements of L.P.A., 1925, s. 52 (conveyance to be by deed), by sub-s. (2) of that s." The older aspect of assent is redolent of the analysis of "cause" in the Aristotelian philosophy. The post-1925 visualisation is the more matter of fact simile of a "curtain" which puts the will at the back of the stage and the personal representative in the forefront. One of the difficulties which the New Property Legislation presented to those trained under the earlier system has been to endeavour to think in terms of the later developments. It is hard for the older generation to visualise a tenant for life as possessed of the creative endowment of a fee simple instead of a mere power—and perhaps even harder to avoid peeping behind the curtain, instead of confiding in the instrumental capacities of the personal representative's assent. Thus a case like the present one is helpful far beyond its immediate scope; it provokes a wider range of thought.

*Hulme* v. *Brigham*, [1943] 1 All E.R. 204, is an interesting case relating to fixtures, and from the standpoint of a conveyancer the main, if not the sole, interest in the case centred upon the point as to whether certain printing machines were fixtures. The machines stood by their own weight and were not fixed to the floor or to any part of the factory building, but the driving apparatus, parts of which were attached to the machines, was fixed to the freehold at certain points. Birkett, J., in an action in the King's Bench Division for delivery of the machines by a plaintiff claiming to be the owner, on payment of their value and damages for their detention, held that the printing machines never lost their chattel nature and were not fixtures. The case illustrates the observations of Lord Macnaghten in *Leigh* v. *Taylor*, [1902] A.C. 157, at p. 162, when his Lordship said: "The question is still, as it always was, has the thing in controversy become parcel of the freehold? To determine the question you must have regard to all the circumstances of the particular case. . . . The mode of annexation is only one of the circumstances of the case, and not always the most important—and its relative importance is probably not what it was in ruder times." In *Northern Press and Engineering Co.* v. *Shepherd*, 52 Sol.J. 715, Eve, J., said (at p. 715): "I should be introducing a dangerous principle if I were to hold that because a machine is worked by fixed mechanism therefore the machine is a fixture. . . . With regard to the indirect attachment to the motive power . . . I should be giving too much importance to the connecting link if I were to hold that it altered the character of the machine." Both these cases were cited by Birkett, J., in his judgment, and the learned Judge may be regarded as having primarily based his decision upon the judgment of Eve, J., above cited. The present case does not break any new ground, but amply confirms the foundation upon which several previous cases rest.

In *District Bank* v. *Luigi Grill*, [1943] 1 All E.R. 136, Lord Clauson, sitting as a Judge of first instance, showed (at p. 138) that as the law stood under s. 24 of the Law of Property Amendment Act, 1859, there was no cause of action in a civil court unless the concealment of an incumbrance had been made with intent to defraud. It had been suggested that the difference in drafting between that section and s. 183 of the L.P.A., 1925, was such that on the true construction thereof a civil cause of action

was given even if there was no intent to defraud, and that to that extent the law had been altered by the later Act. Reference to the text of the judgment must be made to realise the processes of thought by which the learned Judge arrived at his decision, namely, that the law under the later Act is just as it was under the earlier Act, and that unless an intent to defraud is alleged, and, of course, pleaded, a civil action brought under the L.P.A., 1925, s. 183, must fail.

*Re Bennett, Midland Bank Executors and Trustee Co., Ltd.* v. *Fletcher*, [1943] 1 All E.R. 467, is neat logic and is a development of *Re Owers Public Trustee* v. *Death*, [1941] Ch. 389, [1941] 2 All E.R. 589. In the latter case, executors entering into possession of the leasehold properties of the testator became personally liable on the covenants through privity of estate. Simonds, J., ordered a sum to be set aside by way of indemnity in respect of such liability, holding that the Trustee Act, 1925, s. 26, merely protected personal representatives in respect of such liability as they incurred in the normal exercise of that capacity, but afforded no indemnity in respect of liability incurred through privity of estate by entry into possession. In *Re Bennett* (*supra*), Uthwatt, J., held that where executors have assented to a bequest of leaseholds they are not entitled to retain any fund for indemnity in respect of such leaseholds, but they are entitled to retain such a fund where no assent has been made. The two cases must be read together, as they are complementary, and thus afford a clear guide to the position of personal representatives as regards such indemnification.

*Re Thompson and Cottrell's Contract*, [1943] 1 All E.R., revives interest in one of the many valued judgments of Lindley, L.J., as he then was, namely, *Re Finley, ex parte Clothworkers' Co.*, 21 Q.B.D. 475, wherein the positions of the parties upon disclaimer of a lease are fully and lucidly scrutinised and expounded. The present case elaborates the illustrations. Uthwatt, J., held that an underlease of a portion of property comprised in a head lease is none the less aptly described as an underlease although the trustee in bankruptcy of the head lessee has disclaimed the head lease. The head lease was not entirely extinguished as failure to pay the rent thereunder would justify a distress.

BERTRAM B. BENAS.

## Ascertainment of Fact in Relation to Forfeiture

There is much that can be said about *Clayton* v. *Ramsden*, [1943] 1 All. E.R. 16, but here and now it is proposed in the main to show what light an earlier authority can throw upon the question in issue. *Clayton* v. *Ramsden* is an unsatisfactory case, since it casts doubts upon the certainty of one phrase in a will while reversing the decision of the Court of Appeal upon the ground of the uncertainty of another phrase. A testator in his will inserted a condition subsequent whereby his daughter would forfeit her interest if she married "a person who is not of Jewish parentage and of the Jewish faith." "Jewish parentage" is not, it is believed, a frequently employed term in provisions of wills of this kind, but "Jewish faith" is periodically recurrent, and their Lordships did not find it necessary to construe the latter phrase, since they declared the former phrase sufficiently uncertain to avoid the whole condition subsequent. The history of the case shows that before Bennett, J., *sub. nom. Re Samuel, Jacobs* v. *Ramsden*, [1942] 1 Ch. 1, the provisions in question, as to both of them, were held

to be void for uncertainty. The learned Judge said at the close of his judgment (at pp. 10 11) that "it is much better in a matter of this kind for the matter to be considered and decided by a higher tribunal," and in due course it went to the Court of Appeal, where it was held that having regard to the context the words "of Jewish parentage" meant that both parents of the daughter's husband must have been of the Jewish religion at the date of his birth, and the words "of the Jewish faith" that the husband must be a Jew by religion. The judgment of Lord Greene, M.R., stood as the judgment of the Court, and in an elaborate and closely reasoned review of the arguments and previous decisions of relevance, the Master of the Rolls appeared to follow the customary English contemplation of the word "Jewish" as being essentially referable to a community professing a faith distinctively associated therewith (*ibid.*, pp. 13-32). Jewish identity was capable of being established by evidence, and "Jewish parentage" was to read in the light of "Jewish faith." When the case reached the House of Lords, *sub. nom. Clayton* v. *Ramsden* (*supra*), a different ideology emerged from some of the opinions, and "Jewish parentage" being contemplated racially and regarded in that respect indisputably as unascertainable, it was unnecessary to consider "Jewish faith" as a *ratio decidendi*; questions as to the identification of which faith, however, disclosed differences among the learned Lords of Appeal in the course of their several opinions. It may be respectfully submitted that the statutory aspect of the matter, which entered into the arguments and judgment (1942, 1 Ch. 1, at pp. 4, 5, and 10), in the Court of first instance and in the Court of Appeal (*ibid.*, at pp. 12, 13, and 32), but as at present reported did not figure in the opinions of the Lords of Appeal, would appear to be decisive in respect of the meaning to be attached to the words "Jew," "Jewess," or "Jewish" under the Law of England.

In *Keren Kayemeth Le Jisroel, Ltd.* v. *Inland Revenue Commissioners*, [1931] 2 K.B. 465, Slesser, L.J., observed (at p. 494) that "the word 'Jew' in English law has almost always been confined to persons practising the Jewish religion; the disabilities of Jews have not attached to persons of Jewish race who have become baptized. Thus they are generally described in Acts of Parliament and in legal documents as persons practising the Jewish religion (see the Toleration Act, 1846), and Jewish religious endowments and trusts are now recognised and executed by the Courts and regarded as charitable purposes: *In re Michel's Trust*, 28 Beav. 39. The Ballot Act of 1872 speaks of voters of Jewish persuasion. In *In re Cohen* (36 T.L.R. 16), Peterson, J., appears to have treated a bequest for the benefit of deserving Jewish girls on their marriage as being for the benefit of Jewish religion, and thus gave to the word 'Jewish' its religious denotation." It had been suggested, in the Court of Appeal, *arguendo*, that although there are many statutes making special provisions for Jews because of their religion, a defeasance clause requires the highest degree of certainty, which was met in anticipatory argument in the Court of first instance that "if an expression has a clear meaning when contained in a penal Statute, it cannot be uncertain when it occurs in a will," and that "in England legislation specially providing for Jews does so because of their religion and of the difficulties which may be made for them by legislation suitable for Christians, such as that directed to the observance of Sunday" (1941, 1 Ch. 1, at pp. 4, 5, 12, and 13), and Bennett, J., observed in relation thereto, "that, it may truly be said that there are in statutes imposing penalties references to persons of the Jewish religion who

are exempt in certain circumstances from those penalties, and in those cases Parliament has cast on magistrates the duty of inquiring into the state of the religious belief of a person charged that they may find out whether he is or is not subject to penalties." That, one would have thought, with respect, would appear to be sufficiently conclusive as to Jewish categorisation and the evidentiary process necessary to put the matter to proof. *Clayton* v. *Ramsden* is only definitive as regards "Jewish parentage," and that phrase is not common form in wills of the restrictive nature in question. Such restrictions in general have been frowned upon judicially, but they are the inevitable corollary of that freedom of testation so dear to the developed English legal system—instances of a freedom to restrict the freedom of others, legal and legitimate even if disfavoured. Clauses looked at askance from the Bench and in conveyancing practice in general seem none the less to show persistence, and *Cotman* v. *Brougham*, [1918] A.C. 14, in the sphere of company draughtsmanship affords a ready to hand illustration. That such restrictive provisions are not limited to the wills of Jewish testators goes without saying, so that while the conveyancer must now jettison "parentage" from his vocabulary, he is likely for many a day yet to be asked, borrowing the terminology of an old exponent of his craft, "to put the same thing in a slightly different way."

BERTRAM B. BENAS.

## Perpetuities

Two cases relating to Perpetuities show that the subject in itself justifies its title. It perpetually recurs. The short point in relation thereto in *Re Engels, National Provincial Bank, Ltd.* v. *Mayer*, [1943] 1 All E.R. 506, is as to whether a gift over after the termination of the present war is void as being an infringement of the Rule against Perpetuities. Uthwatt, J., held that since it could not be stated with certainty that the war would end within twenty-one years, the gift over in such a case would not necessarily vest within the period limited by the Rule, and consequently failed. The learned Judge observed (p. 508): "In all probability the war may well be over before that period, but as a practical certainty (and that is what the Rule implies) one cannot say that it will." The present writer has reason to believe that many such limitations have been contemplated by testators and settlors, and therefore in drafting provisions of this nature *Re Engels* is a timely reminder (timely in more than one sense) that the essence of the Rule is "possibility" of infringement, and not merely probability. No previous case was cited, according to the report, either in argument or judgment.

The late Lord Leverhulme's dispositions have come before the Courts twice recently in respect of Perpetuities. So far they have been reported in *The Times* newspaper for 29th May and 3rd June. In the first case, *Re Leverhulme, Cooper* v. *Leverhulme*, Morton, J., held that a gift of part of the residue, the distribution of which was postponed until the death of the last survivor of the descendants of Queen Victoria who were living on 7th May, 1925, the date of the testator's death, was not void for uncertainty. His Lordship observed that there was no real distinction between the present case and *Re Villar, Public Trustee* v. *Villar*, [1929] Ch. 243, where the Court of Appeal held that a trust created in similar language was not void for uncertainty. It might be added here that in the new edition of Gray on *Perpetuities*, Section 219, Note 6, it is stated that

"the suggestion has been made that the real objection to the limitation in this case i.e. *Re Villar, supra* was not remoteness but uncertainty," and proceeds: "It is perhaps not important whether the requirement that it shall be reasonably practicable to ascertain the expiration of the period is treated as a part of the Rule against Perpetuities or as independent requirement." The Judges in *Thellusson* v. *Woodford*, [4 Ves. 227 *et seq.*] apparently took the former view. The note refers further to the observations of Lawrence, L.J., in *Re Villar* (*supra*) at pp. 250 and 251. It is noteworthy for conveyancers that Morton, J., observed that "he hoped no draughtsman would again use that well-known formula, which presented no difficulty when first devised, but was not to be encouraged in the case of any testator who died in 1943 or later." No doubt that in view of the dictum of the learned Judge, Lincoln's Inn will give its mind to framing some more convenient method of attaining the objective of testators and settlors.

## A Question as to "Charity"

In a second case, also entitled *Re Leverhulme, Cooper* v. *Leverhulme*, Morton, J., held that a gift of a block of ordinary shares (now stock) in Lever Brothers & Unilever, Ltd., in favour of the staff training college of the company at Port Sunlight, failed on the ground that it was not a charity and that the gift was not one to the company. His Lordship said that the decision in *Re Bowes, Strathmore* v. *Vane*, [1896] 1 Ch. 507, was distinguishable. (The latter case concerned a trust to lay out a sum of money in planting trees on a settled estate, of which the testator was tenant for life, in the places designated by the testator, and if none the trustees were directed to have regard as to place and manner of planting for the wishes of the estate owner. The testator died without designating any place, and it being shown that the estate would not be planted with profit or advantage, the persons absolutely entitled to the estate were entitled to the sum of money free from any condition.) In view of similar provisions being contemplated in respect of great industrial concerns and estates, this second case relating to the late Lord Leverhulme's dispositions is of especial interest. It illustrates without adding to settled principles.

BERTRAM B. BENAS.

## "Legal Evasion" of Taxation

Both here and in the United States there has been a growing recognition on the part of the Judiciary of the essentially anti-social nature of "legal avoidance" of taxation; by this expression is meant the minimisation or avoidance of taxation by methods and subterfuge within the four corners of the law. It is not so long ago that the highest legal authorities in this country accorded positive encouragement to these attempts, as we may see from the following excerpts from judgments in Revenue cases. In *Levene* v. *Inland Revenue Commissioners*, [1928] A.C. 217, Lord Sumner said: "They (i.e., the taxpayers) incur no legal penalties and strictly speaking no moral censure if, having considered the lines drawn by the Legislature for the imposition of taxes, they make it their business to walk outside them." With this we may compare Lord Tomlin's dictum in *Duke of Westminster* v. *Inland Revenue* (1934), 51 T.L., R.467 (H.L.); 19 Tax Cas. 490: "Every man is entitled if he can to order his affairs so that the

tax attaching under the appropriate acts is less than it otherwise would be"; this was said with reference to an arrangement by which the Duke reduced his surtax liability by paying a portion of his servants' wages in the form of a legally binding annuity! Since the end of the last war, as fast as the Legislature stopped up one loophole, the specialist in tax evasion discovered another, and so the process went on accompanied by exceedingly complicated, and almost unintelligible, remedial clauses in the Annual Finance Acts (see, in this regard, paragraphs 25 and 193 of the Report of the Income Tax Codification Committee, 1936 (Cmd. 5131); in recent years the Chancellor of the Exchequer has threatened, if legal evasion of sur-tax proceeded on its current scale, to stop up further loopholes *retrospectively*, and this threat has been effectuated in recent Finance Acts, see Sections 18 of 1936, 14 of 1937, and 24/5 of 1938.

The first dawn of a social conscience on the part of the Judiciary as respects the evils of "legal avoidance" of taxation is to be found in the judgment of Lord Greene, M.R., in *Howard de Walden* v. *Inland Revenue* (1942), 193 L.T. 42 : "For many years a battle has been waged between the Legislature and those who are minded to throw the burden of taxation off their own shoulders on to those of their fellow subjects. . . . It will not shock us in the least to find that the Legislature has determined to put an end to the struggle by imposing the severest penalties." One wonders to what extent the present crisis has influenced the Judiciary in this and subsequent cases. How far the highest Appellate Court has moved in the last decade or so cannot be better exemplified than by quoting verbatim from the opening remarks of the Lord Chancellor in *Latilla* v. *Inland Revenue* (1943) 1 All E.R. 265: "My Lords, of recent years much ingenuity has been expended in certain quarters in attempting to devise methods of disposition of income by which those who were prepared to adopt them might enjoy the benefits of residence in this country while receiving the equivalent of such income, without sharing in the appropriate burden of British taxation. Judicial dicta may be cited which point out that, however elaborate and artificial such methods may be, those who adopt them are 'entitled' to do so. There is, of course, no doubt that they are within their legal rights, but that is no reason why their efforts or those of the professional gentlemen who assist them in the matter, should be regarded as a commendable exercise of ingenuity or as a discharge of the duties of good citizenship. On the contrary, one result of such methods, if they succeed, is, of course, to increase *pro tanto* the load of tax on the shoulders of the great body of good citizens who do not desire, or do not know how, to adopt these manœuvres." What a contrast with the views of Lords Sumner and Tomlin quoted earlier!

A similar change of attitude can be traced in America. For years the principle laid down by the Supreme Court in *U.S.* v. *Isham* 17 Wall. 296, viz., "If a device to avoid taxes were carried out by legal forms, it could not be subject to legal censure," held the field and was repeatedly approved by the Courts, e.g. in *Helvering* v. *Bowen* and *Conn* v. *Eldridge* 79 F (2d) 629, 631. Of recent years, however, the Courts, there, have laid it down, as regards corporate liability at any rate, that "tax advantage may not be derived from corporate transactions which are merely matters of form rather than of substance"; by this seems to be meant that if a device serves no business purpose at all and is wholly in order to minimise tax liability, it will be held to be without substance, cf. *Gregory* v. *Helvering* 293 U.S. 465 and *Higgins* v. *Smith*, 308 U.S. 473.

Now that the anti-social nature of legal evasion of taxation is generally recognised, it is suggested that a bold Chancellor would not have much difficulty in getting through Parliament an all-embracing provision applicable to Income Tax somewhat on the same lines as in Section 35, Finance Act, 1941, which applied to transactions whose purpose was to avoid Excess Profits Tax; the provisions should leave matters at large to the Appeal Commissioners to disregard all the complicated manœuvres adopted to evade taxation and also, perhaps on the lines of Clause 23 of the Finance Bill, 1943, to fix the liability to pay tax on those who actually benefited from the transactions in question. In conclusion, it must be stressed that a stronger sense of their duty to the community on the part of those legal and accountancy gentlemen who specialize in "legal evasion" would, as the Lord Chancellor hinted, not be amiss.

A. FARNSWORTH.

# REVIEWS

**PUBLIC ASSISTANCE. Vol. 1. American Principles and Policies.** By EDITH ABBOTT. University of Chicago Press. 1940. $4.50. xviii + 894 pp.

This is one of the University of Chicago Social Service Series, edited by the Faculty of the School of Social Service Administration, of which Professor Abbott is Dean. Of its nine hundred pages, some seven hundred are devoted to select documents arranged in five parts, to each of which the Editor has written an extensive introduction surveying the main trends in the development of public assistance administration and policy in America, exclusive of work relief and the new forms of public aid which have developed since the Social Security Act became effective, treatment of which topics is left to Volume II. The work is published with the primary object of providing a text for the use of social workers generally and for use in social service schools in particular; and for that purpose the documents selected are stated to be those "not easily available for the class-room." Many of them are of more than special interest; for example, the message of Governor Roosevelt (p. 533) pointing out the duty of the State to provide relief and containing an answer to the question, "What is the State?"

To English lawyers as such, however, this work will be of little interest, for as long ago as 1821 an American court was able to accept counsel's submission that the Elizabethan poor law "is essentially different from ours," the court adding that decisions on that statute "shed no light on the construction of our own law." Indeed, Professor Abbott does not appear to have intended this book for lawyers at all; in which case, it might be suggested that many of the legal technicalities might with advantage be omitted—for example in Case 7 on p. 116 and in Case 5 on p. 329. The former seems an unnecessarily complicated method of teaching a class the quite simple principle that provision of relief is a "positive governmental duty." For the same reason, it could be said that some of the author's phrases are *too* erudite (and perhaps superfluous): for example, when the social worker has been informed that a statute extends liability to brothers and sisters, it is unnecessary to add, "that

is, by extending liability beyond the line of lineal consanguinity to collateral kindred" (p. 159). This is rather a curious trait in one who dislikes legal argument as much as does the Editor, who repeatedly inveighs against "the wasting of public funds in irrelevant legal opinions" (see, for example, pp. 137, 175, 367, 376, 379, 385, 478 *et al.*). Yet the Editor's attacks on legalism are not always on firm ground; for example, to attack the length of legal proceedings on the ground of the relative smallness of the sum involved (e.g. p. 355) ignores the possibility of the proceedings being concerned with the principle at issue rather than with the sum of money at stake. "Test cases" are presumably not unknown in the administration of poor relief in the U.S.A.

Professor Abbott's attack on legalism is but part of her general object, which is not so much to sketch the history of the "social revolution" during the past decade of public assistance in America, as to show the trends (and the necessity for the trends) from the old "pauper laws" administered locally to, first, State aid, and, later, Federal aid. In condemning local administration of relief and all those who have suggested its continuance as the basis of modern public assistance, the Editor is not afraid to show where she stands. For instance one of the documents to be studied is an earlier essay of the Editor which refers to certain statistics of "a Republican Senator, whose figures are probably right even if his politics are wrong." Whether this is altogether the right sort of document for use with beginners in social science schools must be a matter of opinion. It is difficult for one who has not experienced, either actively or passively, the class methods of the American universities to assess the true value of this work to those for whom it is primarily intended. But first impressions suggest that it could with advantage be shortened. For instance, the paragraph in which we are informed on p. 227 that the Opinion we are reading is informal could well be omitted: its repetition on pp. 228, 229 could certainly be. There is, too, some repetition in the cases mentioned; for example Mr. X "who with wife and children left Yonkers, New York, in 1930 to seek work in California" on p. 331, has already appeared (as Mr. A.) on p. 181. Of the order in which topics are treated, it might be suggested that the history of the opposition to public relief in any form (pp. 512–523) could be better dealt with in Part I than in Part V, where it appears rather as a hang-over. Part III (Local Responsibility and Medical Care) appears to confuse the two separate questions, "Who is to provide relief?" and "What relief is to be provided?"

In conclusion, it must be emphasised that these criticisms do not detract from the accuracy with which facts are stated or the honesty or sincerity with which opinions are expressed. This work will no doubt become the classical introduction to its subject-matter in the American schools.

J. A. Coutts.

**CLARKE HALL AND MORRISON'S LAW RELATING TO CHILDREN AND YOUNG PERSONS, INCLUDING THE LAW OF ADOPTION.** Second Edition by A. C. L. Morrison, Senior Clerk of the Metropolitan Police Courts, assisted by L. G. Banwell, Chief Clerk of the Marylebone Police Court. London: Butterworth & Co., 1942. xx and 360 pp. **30s.**

**JOHN A. F. WATSON, THE CHILD AND THE MAGISTRATE.** With an Introduction by the Lord Chief Justice of England, the RIGHT HON. THE VISCOUNT CALDECOTE, C.B.E. London: Jonathan Cape, 1942. 207 pp. Price **10s. 6d.**

These two books are equally indispensable to anybody whose work is, in theory or in practice, concerned with the treatment of young offenders. Whereas Clarke Hall and Morrison's work is a collection of Statutes, Statutory Rules and Orders, and official Circulars, in *The Child and the Magistrate* an account is given of the procedure actually adopted at the Southwark Juvenile Court and of the methods of treatment applied by Juvenile Courts.

The first-mentioned book is, in the Preface, described as the second edition not only of Clarke Hall and Morrison's *Law Relating to Children and Young Persons*, published in 1934, but also of Clarke Hall's *Law of Adoption*, 1928. This fusion has still further enhanced its value. Although Mr. Morrison points out that the present edition is not intended to be a complete statement of the law relating to infants and that, in particular, questions of contract, tort, trusts, and property had to be omitted, the work is no doubt admirably suited for its main object to be of practical use to juvenile court magistrates, clerks to justices, probation officers, police, and other local authorities. Needless to say that much new material had been added, as for instance the Emergency Legislation concerning criminal courts, the Children and Young Persons Act, 1938, the Adoption of Children (Regulation) Act, 1939, and parts of the Public Health Act, 1936.

The following minor suggestions for future editions may perhaps be not out of place. A few statutes which are of exceptional importance for the daily work of a Juvenile Court, as the Probation of Offenders Act, 1907, might be included in full although they apply to adults as well. The comment on Section 50 of the Children and Young Persons Act, 1933, might give a somewhat fuller discussion of the common law presumption, which is occasionally overlooked in Juvenile Courts, that a child between eight and fourteen is *doli incapax*, and something might be said on the controversial and important question whether pre-trial inquiries are permissible under Section 35 of the Act of 1933.

As Mr. Morrison explains in the Preface to the first edition, the lamented death of Sir William Clarke Hall prevented that great pioneer from carrying out his intention to set forth, by way of introduction, his conception of the Juvenile Court, its work and its mission. This unfortunate gap has, in the meantime, at least partly been closed first by Miss W. Elkin's study on *English Juvenile Courts* (1938) and now by Mr. John A. F. Watson's *The Child and the Magistrate*. This successor to the same author's account of the English Prison System, *Meet the Prisoner*[1] is an admirable work written by a lay magistrate who has been known for many years as an ideal chairman of a Juvenile Court in its present form. Whereas Miss Elkin based her observations and criticisms on occasional visits to a considerable number of Juvenile Courts in various districts, Mr. Watson derives his knowledge from eight years of practical work, limited, however, to one Court, and his chief purpose is to describe the working of the Southwark Juvenile Court, without discussing the existing literature on the subject, without comparative studies or detailed suggestions for future reforms. It would be ungrateful

[1] See III M.L.R. 173.

to expect more than the author himself has set out to give, particularly as he has so skilfully and successfully accomplished his object. It is the "human touch" which makes *The Child and the Magistrate* delightful reading.

Though written by a non-lawyer, the book is remarkably free from misinterpretations of the law. On p. 34 it seems to be assumed that the presumption of innocence in favour of the accused is peculiar to English law. Actually it is, of course, a fundamental principle of criminal procedure as such, although its practical application may differ from country to country. The regrettable fact that Juvenile Courts, in spite of their progressive and constructive methods, have still to be regarded as Criminal Courts is recognised by the author. He shows, however, that some, though not all, of the difficulties arising from that fact can be successfully overcome through a reasonable interpretation of the law as it stands. He holds enlightened views on such questions as the need for pre-trial inquiries and psychological examinations. "The ideal arrangement," he writes, "would, of course, be for the Court to receive a medical report upon every child appearing before it; this is the practice in America and its adoption in this country is long overdue. It is quite wrong that a bench of laymen should be charged, as at present, with the responsibility of making a 'spot' diagnosis of the cases which should be referred to the psychiatrist" (p. 67). While whole-heartedly agreeing with the view that the present state of affairs is unsatisfactory, the reviewer may be permitted to point out that considerable differences of opinion exist as to the best remedy. Even in peace time it will be no easy matter to find adequately trained specialists in sufficient numbers to give proper attention to each and every Court case of juvenile delinquency, and, as a consequence, there is the obvious danger that examinations may become superficial. For this and other reasons it has been suggested that better training of magistrates and probation officers to enable them to select cases for thorough medical and psychological examination might be preferable. It is not without significance that even the Report of the Feversham Committee on the Voluntary Mental Health Services (1939) did not go so far as to urge routine examinations of every Court case of juvenile delinquency. The solution will probably have to depend on the facilities available after the war. However, this question is only one part of the much wider problems of Juvenile Court reform and of the working out of a comprehensive scheme of preventing juvenile delinquency, which are outside the scope of Mr. Watson's excellent book.

H. M.

**YOUNG OFFENDERS.** By A. M. Carr-Saunders, Hermann Mannheim, E. C. Rhodes. 1942. x + 168 pp. Cambridge University Press. **7s. 6d.**

This interesting book is the result of an inquiry into the problem of juvenile delinquency instituted by the Home Office in 1938. The three investigators to whom the inquiry was entrusted were able to enlist the help of the Probation Office and the Education Department of the London County Council, and to plan the collection of elaborate statistics relating to the first thousand cases brought before the juvenile courts in London after October 1st, 1938. Later, the investigation was extended to Manchester, Leeds, Sheffield, Hull, Nottingham and Cardiff, and information was collected through the medium of probation officers and the education

services in each town. The inquiry was completed before the war, but the analysis and report were held up by the outbreak of war, and the expectation of a Stationery Office publication was not realised. Since delay would obviously destroy the interest of the facts collected and conclusions drawn, the investigators obtained the permission of the Home Office to publish their results in the form of the present book. Dr. Rhodes writes the detailed account of the inquiry, and uses his statistics in a way which greatly helps to clarify his arguments and conclusions for the general reader. This is preceded by two chapters by Dr. Mannheim—the first being a survey of previous investigations which have added to our factual knowledge of the problem of juvenile delinquency, and the second a sketch of the trends in the incidence of juvenile delinquency during the present century. These two chapters are both comprehensive and clear. They add immensely to the interest of the book for the general reader, and make it of especial value to any magistrate just beginning his work on a juvenile bench. This volume ought indeed to join Dr. Burt's *The Young Delinquent* and Mr. Watson's *The Child and the Magistrate* on the library shelf of every magistrate sitting in a juvenile court.

The authors limited their inquiry from the beginning to the collection of information relating to the social and environmental conditions of juvenile delinquents, leaving the medical side alone in view of important recent work, and agreeing to a separate investigation later of the psychological aspect of juvenile delinquency. The information sought related only to boys found guilty of indictable offences, the investigators regarding girl delinquents as a separate problem needing special inquiry over a longer period than they wished to take with the present inquiry. The scope of the investigation was as exhaustive as it could reasonably be made, and the particulars elicited in each case covered the constitution, type and characteristics of the family of the delinquent, the home environment in respect of neighbourhood and condition of dwelling, overcrowding, parental employment, and finally, the school record in attainments and conduct and the leisure interests of the boy himself, together with facts relating to special influences, such as church attendance. Apart from the exhaustive nature of the questions asked with regard to delinquents, the special feature of this inquiry which distinguishes it from previous investigations which had a similar object, is the use of a control group. Delinquents brought before the courts were matched, with the help of headmasters, by non-delinquent boys of the same age who could reasonably be regarded as "mates" of the delinquents, and exactly the same information was sought from this non-delinquent control group as from the delinquents. The chief interest of this inquiry is, therefore, the statistical comparison of the two groups, and the investigators reasonably claim that their conclusions on the data collected in respect of delinquents are the sounder for the comparison of delinquent with non-delinquent.

The war made it impossible to realise the hope of a further psychological investigation, and the authors of this book are fully aware that as a result the value of the present inquiry is restricted, in that a big problem has been surveyed only as to one part. They recognise that the conclusions they have been able to draw offer no explanation of the phenomenon of increasing juvenile delinquency—that their statistics disclose no new and adverse influences on the lives of children in this country before the war, nor any increased effects of adverse influences previously existing. They point out that a psychological investigation into "susceptibility" to crime

might have added greatly to our knowledge of the underlying causes of delinquency, but would hardly have provided a better answer to the problem of increased juvenile delinquency which is troubling the public, since there is no reason to suspect that the specific types of "susceptibility" which the psychologists can test, increased in either intensity or frequency in the pre-war years. The authors claim reasonably that public concern can be satisfied only by investigations on all aspects of the problem of juvenile delinquency, made at frequent and regular intervals, each type of investigator using the same methods and classifications. They would like to see regular and systematic statistical research into environmental causes of delinquency, together with great extension of research into "susceptibility," supported by investigation into the methods of treating delinquents, and steady sociological research into the changes of social habit and atmosphere.

But while recognising the limitations of statistical methods in relation to a many-sided problem of this kind, the authors claim the interest and importance due to conclusions based on their statistical data and the comparison of delinquent against non-delinquent groups. The data they accumulated with regard to family characteristics show clearly that the chance of a delinquent coming from a home with a disturbed atmosphere—that is, a home where the atmosphere is abnormal owing to chronic parental ill-health, irregular parental habits, parental friction, parental over-harshness or over-laxity, or the absence of one parent altogether—is three or four times as great as the chance of his coming from a home with a normal family atmosphere. With regard to the influence of the environment of the dwelling itself, the method of choosing controls tends to standardise the statistics, but it is nevertheless clear that delinquents are at a slight disadvantage in comparison with non-delinquents in the matter of the condition of their dwelling, and are also at a noticeable disadvantage with regard to overcrowding for sleeping. It is also obvious from the figures that the delinquents are at a further disadvantage with regard to parental employment. The authors point out that all these factors must have an influence on juvenile delinquency, but that none can be a root cause, since the same factors exist to a lesser degree in the control group of non-delinquents.

Similarly, the data relating to the boys themselves show that the delinquents have not as good a school record, either for conduct or attainment, as the control group; that delinquents have not had the advantage of moral training offered in church or Sunday School to the same extent as the control group, and that delinquents are less lively and interesting in themselves than the control group, and less inclined to indulge in definite pursuits and hobbies, such as sport, indoor games, handcrafts, music, and reading in their free time. But once more, this characteristic dullness appears to a lesser degree amongst the control group, and the disadvantageous elements for the delinquent must not be stressed too far. The figures prove also that all these disadvantages so far mentioned cannot be put down to poverty in the delinquents' homes. Poverty might explain many of the disadvantages on many occasions, but in fact, most poor families are not delinquent, and some well-off families are. Poverty, therefore, is not a main cause of delinquency, but disturbance of mind and home caused by irregularity of parental employment may well be an influential factor, especially if that irregularity be due to restlessness of temperament or poor mental and moral equipment, which could make a parent unable to acquire any skill or keep any job. So poverty due to

faults of character might contribute to delinquency through disturbance of the atmosphere in the home, rather than through its direct effects. Other factors influencing towards delinquency seem to be the presence of other delinquents in the home, unemployment amongst young persons, and homes abnormal in their family constitution. Homes where the heads of the household are cohabiting irregularly show an amazing degree of juvenile delinquency. These statistics show that the incidence of crime rises in places and at times when opportunity for crime is greater. They show also that a large proportion of crimes occurs during late dark hours when well-brought-up children and young persons are normally under adult control. The authors point out that figures here suggest that parents should often be prosecuted for laxity in allowing too much liberty and opportunity for crime in curfew hours, rather than the juvenile charged with committing an offence.

In spite of the limitations of a statistical inquiry into the social and environmental causes of juvenile delinquency, the authors suggest that some lines of action seem to be indicated. Firstly, parents should be taught to regard it as their duty to see that juveniles do not get too easy an opportunity for crime, and should be forced to recognise their responsibility for controlling juveniles after the hours of darkness. And secondly, though this would be slower in effect, parents should be taught to treat children without either undue harshness or undue laxity. A growing body of educational opinion would like to see also a more general recognition of the parental duty to provide effective moral training.

E. TREHARNE.

**DIGEST OF INTERNATIONAL LAW.** By GREEN HAYWOOD HACKWORTH. United States Government Printing Office, Washington, D.C. Vol. I (1940), pp. 803; Vol. II (1941), pp. 829; Vol. III (1942), pp. 820. Each $2.

These first three volumes of yet another series of the *Digest of International Law*, published under the auspices of the State Department of the United States, are a worthy successor of the *Digests* of Wharton and Moore. The new series has been prepared by Mr. Hackworth, the Legal Advisor of the Department of State, a scholar of sound judgment and excellent perspective. Although the *Digest* is intended largely as a guide to the practice of the United States, the three volumes published so far aim at—and have successfully achieved—a much wider object. In many respects, they give a comprehensive picture of the international practice of other States. In this matter Mr. Hackworth has been more ambitious than his two predecessors and, consequently, the usefulness of the *Digest* has been considerably increased. At the same time there will probably be general approval of his decision to curtail the space allotted to independent comment and exposition. These could in any case be only of a summary nature, and there ought to be no doubt that the author's restraint is in accordance with the character and the purpose of the *Digest*.

In the first volume, after dealing with the preliminary questions of the nature, the sanctions, the sources, and the codification of international law, as well as with its relation to municipal law, Mr. Hackworth has included material on the various types of States, including Mandates, and on recognition of states, governments, and belligerency. The subject of recognition alone occupies over two hundred pages and it includes a lucid survey of the decisions of the courts of the United States. Two long

chapters are devoted to territory as well as territorial changes and their effects, and to various aspects of territorial limits. The latter include rivers, the marginal sea, bays and gulfs, boundaries and fisheries. Vol. II covers problems of jurisdiction on such questions as legislation in the matter of industrial property, copyright, foreign exchanges, judicial assistance, and police regulations; the territorial operation of municipal law; extraterritorial crimes; jurisdiction in ports and over foreign merchant vessels; and marriage and divorce. The longest chapter is devoted to various forms of exemption from territorial jurisdiction, extraterritorial jurisdiction and asylum. There is an exhaustive chapter on the jurisdiction on the high seas, nationality of vessels, and interoceanic canals. The third volume covers the subject of nationality (including naturalization) in its manifold ramifications, in particular with reference to loss of nationality and of right to protection. There is a technical chapter on passports and registration of citizens abroad. The final chapter of about three hundred pages on the treatment and the position of aliens is invaluable in its wealth of detail drawn from most recent material.

In this latter respect the author has performed admirably what is, in the circumstances, a difficult task. The volumes contain copious extracts from and reference to files of the State Department as recent as 1939. There are occasional departures from this policy of bringing the exposition up to date as, for instances, in the matter of the German action with regard to the denunciation of the provisions relating to the Kiel Canal or with regard to the Suez Canal Convention in relation to the sanctions under Article 16 of the Covenant. However, it is possible that these exceptions may have been intentional. So is also probably the policy to reduce the length of extracts from the United States Senate Series on Foreign Relations, for the reason that these volumes are easily accessible.

Mr. Hackworth's *Digest* is a standard book of reference and information, and any praise of it would be redundant. But it is proper to acknowledge gratefully the prodigious amount of work which the author and his collaborators have expended on its preparation. Neither is it out of place to express the hope that the authorities in Great Britain may see their way to sponsor or, for that matter, to undertake a *Digest* of this nature. The available material is rich and varied. In some respects—witness, for instance, the imposing wealth of material to be found in the *Opinions of the Law Officers of the Crown*—it is richer than the comparable sources in the United States. A British Digest of International Law would be of immeasurable benefit not only to the student, but also to British diplomatic and consular representatives as well as to other authorities.

H. LAUTERPACHT.

**TREATIES AND CONSTITUTIONAL LAW: PROPERTY INTERFERENCES AND DUE PROCESS OF LAW.** By W. B. COWLES. American Council on Public Affairs, Washington D.C., 1941. Pp. xvi, 315. Price $3.50.

This interesting book deals with an important, though limited, problem of the constitutional law of the United States of America. The Fifth Amendment of the Constitution provides that "no person shall . . . be deprived of . . . property without due process of law; nor shall private property be taken for public use without just compensation." On the other hand, according to Article VI, Clause 2, "this Constitution and the

laws of the United States which shall be made in pursuance thereof and all treaties made or which shall be made under the authority of the United States shall be the supreme law of the land." If a treaty involves the taking of property without due process, the problem arises whether or not its terms shall prevail over the Fifth Amendment. In the British Debts Case, *Ware* v. *Hylton* (1796), 3 Dall. 199, the Supreme Court answered in the affirmative, but after a comprehensive discussion of all relevant cases the author reaches the conclusion that the doctrine of judicial review extends to treaty cases, that the Courts cannot disregard the Fifth Amendment in treaty cases and that, therefore, they have to, and do, refuse to enforce the provisions of a treaty purporting to override the title of the owner of property.

The book was completed and published before the decision of the Supreme Court in *U.S.* v. *Pink* (1942), 62 Sup. Ct. Rep. 552; American Journal of International Law, 1942, 309. To the non-American reader it would seem that that extraordinary decision makes short work of the author's thesis. Yet his very compendious book makes stimulating reading and should attract and retain the attention of all those who are interested in the two provisions of the American Constitution which, from the point of view of international law, are probably of the greatest significance.

F. A. M.

**A PERMANENT UNITED NATIONS.** By Amos J. Peaslee. G. P. Putnam's Sons, New York, 1942. 146 pp. **$1.50.**

Mr. Peaslee is a distinguished American jurist and known to international lawyers from the *Black Tom* and *Kingsland* sabotage cases. His book is a symposium of articles written between 1916 and 1942 on various topics of International Law and Organization, ranging from the sanctions of international law to financial problems of world government. The connecting link between these thoughtful and stimulating essays is the author's vivid consciousness of the limitations of existing international law and his constructive attitude towards the tasks that lie ahead. As he clearly realizes, the crucial issue is the reality and ideology of national sovereignty, and he advocates the creation of permanent federal institutions within the elastic framework of the "United Nations." In Mr. Peaslee's opinion, the control of the aggressors in World War No. 2 should form the paramount duty of this new international organization, and the writer is fully aware of the futility of another half-way house between power politics and a true international community. He suggests the adoption of a written federal constitution by the "United Nations" which, however, should "wisely omit any express provisions upon the sensitive issue of sanctions and the question of right of withdrawal." The experience of the American Civil War and, conversely, the inclusion of the secession clause into the federal Constitution of the U.S.S.R. have, however, taught the lesson that the cohesion of a federation depends on the existence of a political, economic and social homogeneity which even the most ingenious drafting does not vitally affect. Equally, whether the pattern of the "United Nations" will prove to be more than another blue print will depend on whether—to use Collingwood's pregnant distinction—the "United Nations" choose to take an eristic or dialectic approach to the formidable task of post-war reconstruction.

G. Schwarzenberger.

**TOWARDS A UNITED STATES OF EUROPE.** By Abraham Weinfeld. American Council on Public Affairs. 1942. 52 pages.

The author of this pamphlet must be congratulated on his resolute courage in laying down, in clear and precise terms, a draft Constitution for a future United States of Europe. Thirty-four pages of introduction are followed by 13 pages of Constitution.

In Britain, the delusive passivity of the first six or seven months of war produced a flood of constitutional blueprints—most of them now relegated to oblivion; but subsequent events have called a timely halt to this production line, and thinking on post-war problems now centres on the political and economic foundations; it is all to the good that the proper order should be followed. To evolve laws and constitutions without any clear idea on the foundations is putting the cart before the horse. This is not to say that the lawyer cannot take an active and important part in examining legal problems that are bound to be of great importance, such as the status of international corporations or the effect of the infiltration of economics in public international law.

When the pamphlet under review was published—early in 1942—the United States may have been in a psychological state comparable to that of Britain in 1939–40. We venture to draw the parallel further and suggest that this blue-print will suffer the same fate as its British and American predecessors. At most it may stimulate some discussion.

The pamphlet is based on the following assumptions—

1. That the American Constitution will be the model for a European Federation.

2. That the Soviet Union and Britain will be outside a United States of Europe.

3. That the existing nation states of Europe, while forming a Federal Union, will otherwise remain unaltered, in composition, structure, etc.

Each of these assumptions is questionable in the extreme. The American Constitution, admirable in many respects, is itself in a state of crisis, in particular as regards the distribution of powers between Federation and States in matters of economic and social legislation. Moreover, the background of the American Constitution, the amalgamation of races and nationals immigrating from all over the world into one American citizenship, is largely inapplicable to the national groups of Europe. Mr. Weinfeld, indeed, wishes to protect national groups as public corporations; but that this vital difference may make the American pattern inapplicable has not occurred to him. He wishes to give only limited powers to the Federation. The enumeration of seventeen specific powers does not even skim the surface of the problem of economic planning—vital for post-war Europe. The author does not even seem to have considered some recent Federal constitutional developments.

Together with this timidity in regard to Federal powers goes the bold proposal of a President of the United States of Europe, in whom the executive power shall be vested. He is head of all armed forces, makes treaties with the consent of the Senate, etc. He has no Cabinet and the member states, apparently, do not assist him.

The exclusion of the Soviet Union, as a matter of course, deprives this blue-print of most of such practical value as it might otherwise have had; but it has also prevented the author from studying the outstanding experiment so far carried out in the vital question of reconciliating national

autonomy and group survival with federal economics, social and political planning. One of the most burning problems of post-war Europe is the future of the many small and medium states, often composed of many groups, economically and militarily a prey of bigger neighbours. The ideas expressed by such leaders of thought as Mr. Wallace and Dr. Benes seem to go in the direction of a universal system of collective security and co-ordination, coupled with a number of regional federations which will form tolerably balanced units and overcome the dilemma of small-scale nationalism and big Power attrition. Mr. Weinfeld's answer to these problems is as follows—

> "The number of representatives shall not exceed one for every million inhabitants, but each state shall have at least one Representative. . . . (Sect. 2).
>
> "The States of — shall be entitled to —— Senators each. (Sect. 3)."

This, we fear, will not provide the salvation of Europe.

W. FRIEDMANN.

**PALMER'S COMPANY LAW.** Seventeenth Edition. By HIS HONOUR JUDGE TOPHAM. London, 1942. Stevens & Sons, Ltd. lxii and 720 pp. **30s.** net.

There is no need to introduce *Palmer's Company Law* to the readers of the MODERN LAW REVIEW. It is one of the standard works of English law, and, with its valuable Appendices of references to leading cases, Statutes and Rules, it is one of the necessary implements of the trade of every practising lawyer and also of the teacher of this subject.

The publication of this Seventeenth Edition, however, calls for a word of comment. The Sixteenth Edition was published in 1938. There was no need for the editor to make more than very slight alterations after this short period. There are forty new decisions in the Table of Cases, one of them, the *Knightsbridge* case, is also mentioned in the Table of Leading Cases at the end. Most of the type was apparently left standing after the last edition, and more than nine-tenths of the book are completely unchanged. Those alterations which have been made could have been included in a pamphlet of not more than 15 pages, to be published at a few shillings. The price of the Sixteenth Edition was 25s., the price of this new one is 30s.

Many important MSS. cannot now be printed for lack of paper. Is it really justifiable to use more than 800 pp. of excellent paper for a purpose like this? What is more, is there, even in peace time, any justification for the policy of law publishers to re-publish every few years new editions of expensive standard works, instead of printing additions embodying recent changes in legislation and case law? Is not this an unnecessary expense imposed upon the legal profession? Be that as it may, the present paper shortage should induce publishers to depart from their peace-time practice.

One or two omissions have occurred to the present reviewer. A reference to *Regal* v. *Gulliver*, [1942] 1 All E.R. 378, might have been expected in the chapter dealing with "Directors as Trustees." The case is only mentioned under "Contracts by Directors with Company." Again, the *Knightsbridge* case is not discussed where the author deals with "Clogging the

Equity." *Armour* v. *Liverpool Corporation*, [1939] Ch. 422, is not mentioned in the chapter on "Illegal Associations."

On the whole, however, the book retains the high merits which have made it deservedly popular with the legal profession.

O. KAHN-FREUND.

**PRINCIPLES OF MERCANTILE LAW.** By J. CHARLESWORTH. Fifth Edition. London (Stevens & Sons, Ltd., and Sweet & Maxwell, Ltd.), 1942. **10s.**

Teachers and students of mercantile law will be grateful to Dr. Charlesworth for having ventured upon a new edition of his well-known textbook in spite of the war. The author has included a brief summary of the Hire-Purchase Act, 1938, and rewritten the chapter on "time for bringing actions" in the light of the Limitation Act, 1939. War-time legislation is not discussed at any length.

This is a very good textbook for beginners. The distribution of emphasis in a book of this kind is probably a matter on which two men will not easily agree. The present reviewer would find it easier to recommend the book to his non-legal students of commercial law if a brief chapter on company law was included—perhaps at the expense of the somewhat elaborate discussion of bankruptcy law. It is only the more advanced or ambitious student who can be trusted to read the author's admirable textbook on company law, and the large majority of elementary students must be provided with a brief and comprehensive summary of this difficult topic.

In a new edition the author might perhaps consider whether his enumeration of five types of contracts *uberrimae fidei* at p. 45 is not a little bewildering to the beginner, especially in view of the fact that on the subsequent page, and again at p. 263 and p. 275, the author himself rightly explains that contracts for the sale of land, suretyships, and partnerships are contracts *uberrimae fidei* only in a very special sense.

The student of commercial law who takes the subject as part of a course leading up, for example, to the degree of Bachelor of Commerce, must learn to understand that this subject is not separated by an unbridgeable gulf from such topics as economics, business administration, etc. There is little in Dr. Charlesworth's book to make him aware of this fact. The role played by the various types of transactions in commercial life is hardly touched upon, and topics like standard contracts, price fixing agreements, etc., are only slightly discussed under headings under which the elementary student is not likely to look for them.

This shortcoming—if it is one—is shared by the book with most other works of this kind. It does not diminish the great value of the book as an excellent brief introduction into the principal doctrines of mercantile law.

O. KAHN-FREUND.

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# SPECIAL NOTICE

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We have received a number of applications for earlier issues of the review and find that we are unable to supply copies of Vol. III, Nos. 2 and 3, as our stock of copies of these issues is exhausted. We should, therefore, like to buy copies of these two issues which are in good condition, and which are returned to our office at 12 and 14 Newton Street, High Holborn, London, W.C.2.

If readers whose copies have been lost or damaged and who wish to complete their sets will communicate with us we shall be glad to supply the missing copies. If the number of copies of Vol. III, Nos. 2 and 3, needed is sufficient to cover the cost we shall re-print these issues.

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